Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

CHARLES WILLIAM O'BRIEN, ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. What constitutes a showing of exigent circumstances sufficient for the Government to seize *real* property without providing a claimant with prior notice and an opportunity to be heard?

2. Where the Government fails to establish that exigent circumstances obviate an individual's right to pre-seizure notice and hearing, what is the appropriate remedy for a *Good* violation?

LIST OF ALL PARTIES

Petitioners herein are Charles William O'Brien and Winterhaven Trust, R.J. Adams, Trustee.

The Claimants-Appellants below were Charles William O'Brien and Winterhaven Trust, R.J. Adams, Trustee. Plaintiff-Appellee below was the United States of America and the Defendant below is Real Property located at 1184 Drycreek Road, Granville, Ohio 43023.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Charles William O'Brien and Winterhaven Trust, R.J. Adams, Trustee, respectfully pray that a writ of certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on April 23, 1999.

OPINIONS BELOW

The opinion of the court of appeals (App. 1-27) is reported at 174 F.3d 720 (6th Cir. 1999).

The opinions of the district court (App. 46-53 and 54-59) are unreported.

JURISDICTION

The Court of Appeals entered its judgment on April 23, 1999. Its order denying Petitioner O'Brien's Petition for Rehearing (App. 60) was issued on June 17, 1999.

On August 19, 1999 this Court extended the time within which to file a petition for a writ of certiorari to and including October 15, 1999.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

On September 16, 1993, the United States (hereinafter the "Government") filed its Complaint for Forfeiture In Rem pursuant to 18 U.S.C. Section 981 seeking to forfeit the real property located at 1184 Drycreek Road, Granville, Ohio 43023 (hereinafter the "property"), alleging that the property was proceeds of, or was used to facilitate, bank fraud and related money laundering.

On the same day the District Court issued its warrant of arrest in rem against the property and issued a temporary restraining order prohibiting the occupant, Charles William O'Brien and his family or agents from entering or occupying the seized property which was used as their residence. The property was seized by the United States Marshals Service later that same day. All personal property of O'Brien and his family, located on the property was also seized. When O'Brien returned to his home on Drycreek Road, he found armed guards at the entrance to the property's driveway, thereby preventing any entrance to the property, and tape around the perimeter of the property to prohibit access to it.

The following day O'Brien was served with notice that his property had been seized. On October 16, 1993 a copy of the summons, complaint and warrant in the civil forfeiture action was served upon R.J. Adams, Trustee of Winterhaven Trust (hereinafter Winterhaven), the record owner of the property.

On November 1, 1993, Petitioners O'Brien and Winterhaven moved the District Court for an adversary hearing to determine whether there was probable cause to justify the seizure. A hearing on probable cause was not

held by a magistrate judge until June 23 and June 26, 1995. On October 3, 1995, the Magistrate's Report and Recommendation was issued finding there was probable cause for the forfeiture and that exigent circumstances warranted seizure of the property without prior notice to O'Brien or Winterhaven. (App. 28-45) Objections to the Magistrate's Report and Recommendation were timely filed by O'Brien. The District Court adopted the Report and Recommendation in its entirety on March 21, 1997. 174 F.3d at 725. (App. 46-53).

On July 31, 1997, following the filing of numerous pleadings, motions, memoranda, and the granting of the Government's Motion for Summary Judgment, the District Court issued an order forfeiting the real property to the United States (App. 54-59).

The Sixth Circuit, in a two to one decision, affirmed the District Court's ruling in favor of the Government, holding that exigent circumstances justified the *ex parte* seizure of the subject property. In so holding the Court noted O'Brien's history of forging documents to effect illegal property transfers, and opined that means less drastic than *ex parte* seizure may have proved inadequate. The Court further noted that it did not need to determine the appropriate remedy where pre-deprivation notice and hearing were improperly denied in light of its holding that the instant seizure was appropriate under the circumstances.

Judge Daughtrey, in her dissent, disagreed with the majority's opinion that exigent circumstances were present to justify depriving O'Brien of his home without prior

notice and hearing. She concluded that "an egregious due process violation has occurred in this matter." She explained that diligent review of court files and a requirement of official document inspection prior to removal of any notices, restraining orders, or bonds would have sufficiently safeguarded the subject property until such time as the probable cause hearing on the forfeiture was conducted. 174 F.3d at 732-33.

REASONS FOR GRANTING THE WRIT

This petition for writ of certiorari should be granted for three compelling reasons. First, the decision below conflicts with *United States v. 51 Pieces of Real Property, Roswell, New Mexico*, 17 F.3d 1306 (10th Cir. 1994) as to the existence of exigent circumstances when *ex parte* deprivation of real property is at issue.

Secondly, in affirming the court below, the appellate court has so far departed from this Court's mandate in *United States v. James Daniel Good Real Property*, 510 U.S. 43, 114 S.Ct. 492, 126 L.Ed. 2d 490 (1993) that exercise of this Court's supervisory power is required.

Thirdly, granting of the instant petition will provide this Court with a vehicle to settle a significant conflict among the circuit courts as to the appropriate **remedy** available to claimants when the government seizes real property in violation of the due process rights established by the Court in *Good*.

I. THE DECISION BELOW CONFLICTS WITH *UNITED STATES V. 51 PIECES OF REAL PROPERTY, ROSWELL, NEW MEXICO*, 17 F.3d 1306 (10th CIR. 1994) AS TO THE EXISTENCE OF EXIGENT CIRCUMSTANCES WHEN *EX PARTE* DEPRIVATION OF REAL PROPERTY IS AT ISSUE.

The complaint for forfeiture alleged that petitioner's home was subject to civil forfeiture under 18 U.S.C. § 981 because it was property involved in money laundering, in violation of 18 U.S.C. § 1956, and in a scheme to defraud banks, in violation of 18 U.S.C. § 1344 ("FIRREA"). The facts in this case are similar to those in *United States v. 51 Pieces of Real Property, Roswell, New Mexico*, 17 F.3d 1306 (10th Cir. 1994). In *51 Pieces of Real Property* the Government sought to civilly forfeit property that had been purchased in furtherance of a money-laundering scheme. The property was titled in the name of a business trust organization, and the Government alleged that Donald Austin, the defendant in the related criminal case, was the alter ego of the trust.

Because Austin "frequently transferred title to defendant properties through numerous entities, names, and individuals in various states, in an effort to continue to control the properties while keeping hidden," the Government argued that exigent circumstances justified the postponement of notice and hearing until after the property had been seized. *Id.* at 1315. The Government argued that had the trust and Austin been notified in advance of the seizure, another series of quitclaim deeds and other fraudulent transfers would have been launched, thereby frustrating the Government's interest in protecting its claim to the realty. *Ibid.*

Citing this Court's decision in *Good*, the Tenth Circuit rejected the Government's contentions and found that it failed to show that exigent circumstances justified an *ex parte* seizure, stating (*ibid.*):

> The government's interest in preventing Austin or Nitsua from further concealing their real property assets through subsequent transfers could, however, be protected through the use of less restrictive measures than seizing the property.

Nearly identical arguments were made by the Government in the case at bar. However, the Sixth Circuit Court of Appeals agreed with the Government by ruling that O'Brien's history of transferring real estate indeed constituted exigent circumstances sufficient to justify lack of pre-deprivation notice and hearing to both O'Brien and Winterhaven. In so ruling the appellate court stated (174 F.3d at 731 n.8):

> We decline to follow *51 Pieces of Real Property* to the extent it held that the government failed to demonstrate that measures short of seizure would have protected their interest in preventing the claimants from concealing their real property assets through subsequent property transfers.

Comparison of the decision of the Court of Appeals below with the holding of *51 Pieces of Real Property* shows that these two Courts of Appeals have reached conflicting results based upon essential identical facts. Review by this Court is warranted to determine whether the *Good* notice and hearing requirements may be dispensed with whenever the district court perceives a risk that the real

property owner may attempt to thwart a forfeiture by forging documents or making fraudulent transfers.

II. THE SIXTH CIRCUIT HAS SO FAR DEPARTED FROM THIS COURT'S MANDATE IN *UNITED STATES V. JAMES DANIEL GOOD REAL PROPERTY*, 510 U.S. 43, 114 S.CT. 492, 126 L.ED. 2D 490 (1993) THAT EXERCISE OF THIS COURT'S SUPERVISORY POWER IS REQUIRED.

After this Court's holding in *Good*, there remained no doubt that, except in very limited circumstances, an individual's right to maintain control over real property and to be free from government interference is to be carefully guarded. This right can only be taken away after the Government's use of procedural safeguards, which includes pre-seizure notice and opportunity to be heard. Seizures of real property without prior notice and hearing are permitted only in extraordinary situations involving exigent circumstances. In this case the District Court held that O'Brien's alleged history of "fraudulently obtaining satisfactions of mortgage and fraudulently transferring title to the defendant property" constituted exigent circumstances justifying the *ex parte* seizure of the property. However, the holding in *Good* mandates that "the Government must show that less restrictive measures – *i.e.*, a *lis pendens*, restraining order, or bond – would not suffice to protect the Government's interests in preventing the sale, destruction, or continued unlawful use of the real property." *Id.* at 505.

In the case at bar, there was no showing that less drastic measures than seizure would not have sufficed. A notice of *lis pendens* would put prospective purchasers

and encumbrancers on notice that any interest acquired by them in the described property is subject to the outcome of pending litigation. As this Court recognized in *Good*, the Government could also have obtained an *ex parte* restraining order against O'Brien. 510 U.S. at 58. By contrast, the Government's seizure of the real property in no way insured against a fraudulent transfer of that property. In addition to filing a *lis pendens* notice and obtaining a restraining order, the Government could have monitored courthouse filings to determine whether any action had been taken regarding the property.

The mere recitation of allegations in the Complaint for Forfeiture in Rem, accompanied by affidavits of government agents, was insufficient to show that less restrictive measures were inadequate. Indeed, that question was not even addressed in the *ex parte* proceeding. As noted by this Court in *Good*:

> Fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights . . . No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.

114 S.Ct. at 502, quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 12, 170-72 (1951) (Frankfurter J., concurring).

The seizure of the property in this case without a pre-deprivation hearing is even more egregious than in the *Good* case. Here the title owner of the property at the time of seizure was Winterhaven, but the property was the personal residence of O'Brien and his family – unlike the situation in *Good*. O'Brien had merely been indicted,

where the defendant in *Good* had been convicted at the time of seizure. Further there was a significant factual question as to whether the property was even related to O'Brien's alleged criminal behavior. Obviously, none of these issues could have been raised by either O'Brien or Winterhaven prior to seizure since they were not afforded pre-seizure notice and an opportunity to be heard.

III. GRANTING OF THE INSTANT PETITION WILL PROVIDE THIS COURT WITH A VEHICLE TO SETTLE A SIGNIFICANT CONFLICT AMONG THE CIRCUIT COURTS AS TO THE APPROPRIATE REMEDY AVAILABLE TO CLAIMANTS WHEN THE GOVERNMENT SEIZES REAL PROPERTY IN VIOLATION OF THE DUE PROCESS RIGHTS ESTABLISHED BY THE COURT IN *GOOD*.

Once a due process violation is established following an unjustified seizure of real property without notice and opportunity to be heard, there is a serious conflict among the circuits with regard to the appropriate remedy for a *Good* violation.

The Second Circuit appears to limit a claimant's remedy to suppression of any evidence impermissibly obtained as a result of the improper seizure. *United States v. Premises Located at 4492 South Livonia*, 889 F.2d 1258 (2d Cir. 1989).

The Eighth Circuit has held that the proper remedy is dismissal of the forfeiture action without prejudice, leaving open the right of the government to refile. *United States v. One Parcel of Real Property Located at 9638 Chicago Heights*, 27 F.3d 327 (8th Cir. 1994); *United States v. One*

Parcel of Real Property, 48 F.3d 289 (8th Cir. 1995). In *One Parcel of Real Property Located at 9638 Chicago Heights*, the Eighth Circuit rejected the suppression remedy, stating that, "suppression of seized evidence provides no remedy at all when the purpose of the seizure is not to acquire evidence, but to assert a possessory interest over the property." *Id.* at 330.

Several circuits have denied claimants' motions to dismiss the forfeiture actions, but have awarded damages in the form of restitution of net rents which have accrued to the Government as a result of the illegal seizure. See *United States v. 51 Pieces of Real Property, Roswell, New Mexico*, 17 F.3d 1306 (10th Cir. 1994); *United States v. All Assets and Equipment of West Side Building Corp.*, 58 F.3d 1181 (7th Cir. 1995), *cert. denied*, 516 U.S. 1042 (1996); *United States v. Marsh*, 105 F.3d 927 (4th Cir. 1997).

In *United States v. Real Property Located in El Dorado Cty. at 6380 Little Canyon Road*, 59 F.3d 974 (9th Cir. 1995), the Court noted that the return of rents may not be the sole relief available to a claimant, indicating that monetary relief for loss of use and enjoyment for the period of the illegal seizure of the realty may also be an appropriate form of relief. This is particularly true, according to the Ninth Circuit, where the property seized is the claimant's personal residence. The Court indicated that dismissal may also be an appropriate remedy in such circumstances. The District Court for the District of Columbia in *United States v. Property Identified as Lot Numbered 718*, 20 F.Supp.2d 27 (D.D.C. 1998) followed the

Ninth Circuit's reasoning, holding that where an individual's personal residence is illegally seized, ordering dismissal is the only solution that affords meaningful relief. In so holding, the Court stated (20 F.Supp.2d at 38):

> If constitutional concerns about civil forfeiture are most serious when an individual's home is at stake, . . . , then the resident certainly deserves no less compensation than the landlord.

The issue of what constitutes an appropriate remedy for a *Good* violation is one that deserves this Court's review. Although the Sixth Circuit did not need to reach that issue in this case, it held that the government is only responsible for the rents and profits of which the claimant was deprived during the period of illegal seizure. 174 F.3d at 728. However, Judge Daughtrey dissented on that issue as well. She would have held that "a more appropriate measure of damages for the constitutional violation might well have been set at recompense for O'Brien's inconvenience and the cost of the replacement housing he was forced to procure from the time of the improper seizure until the date on which the probable cause hearing was conducted." 174 F.3d at 733.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the Judgment and Opinion of the Sixth Circuit.

Respectfully submitted,

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APPENDIX

UNITED STATES of America, Plaintiff-Appellee,

v.

REAL PROPERTY LOCATED AT 1184 DRYCREEK ROAD, GRANVILLE, OHIO 43023, Defendant,

Charles William O'Brien, Claimant-Appellant (97-4158),
Winterhaven Trust; R.J. Adams, Trustee, Claimant-Appellant (97-4160).

Nos. 97-4158, 97-4160.

United States Court of Appeals,
Sixth Circuit.

Argued Jan. 29, 1999.

Decided April 23, 1999.
Rehearing Denied June 17, 1999.

James D. Owen (argued and briefed), Columbus, OH, for Defendant, Claimant-Appellant in No. 97-4158.

Marcia J. Harris (briefed), Office of the U.S. Attorney, Columbus, OH, for Plaintiff-Appellee in No. 97-4160.

James D. Owen (argued), Columbus, OH; Gina M. Dougherty (briefed), Columbus, OH, for Defendant, Claimant-Appellant in No. 97-4160.

Before: KENNEDY, DAUGHTREY, and CLAY, Circuit Judges.

KENNEDY, J., delivered the opinion of the court, in which CLAY, J., joined. DAUGHTREY, J. (pp. 732-733), delivered a separate opinion concurring in part and dissenting in part.

KENNEDY, Circuit Judge.

Claimants Charles W. O'Brien and Winterhaven Trust appeal the district court's decision to grant civil forfeiture under 18 U.S.C. § 981 of real property located at 1184 Drycreek Road, Granville, Ohio, 43023. In its complaint for civil forfeiture in rem, the government alleged that the property was forfeitable to the United States because it was property obtained by bank fraud, and was proceeds of or was used to facilitate bank fraud and related money laundering in violation of 18 U.S.C. §§ 1956, 1957, and 1344. Claimants Winterhaven Trust ("the Trust") and Charles O'Brien ("O'Brien") contend that the district court erred in granting the government's motion for in rem forfeiture in the absence of pre-seizure notice and hearing, and that the district court erred by failing to suppress the seizure of the property as a remedy for the government's warrantless search, seizure and confiscation of the property and its contents. The Trust alone also contends that the district court erred by granting the government's motion for summary judgment on the forfeiture, by forfeiting the real property in violation of the Eighth Amendment's prohibition against excessiveness and disproportionality, and by failing to grant a stay of the forfeiture proceedings while criminal charges related to the same or similar conduct were pending against one of the claimants. For the reasons set forth in the following opinion, we shall affirm.

I. BACKGROUND

Claimant Charles W. O'Brien ("O'Brien") is a Columbus, Ohio area businessman with multiple real estate holdings. He had been a customer of Bank One since at

least 1971. The instant action arises from a series of transactions between O'Brien and Bank One, as well as other Ohio financial institutions, in which O'Brien sought loans using the defendant property as collateral.

A. Ownership of the defendant property

On January 28, 1980, Bank One made a demand loan of $85,000 to O'Brien for the purpose of purchasing the defendant residential property, located at 1184 Drycreek Road, Granville, Ohio. The property had been damaged in a fire prior to O'Brien's acquisition and O'Brien told the bank that he intended to use the loan to make repairs. O'Brien told the bank that he would repay the loan by means of permanent financing from another bank.

Over the next several years, Bank One made numerous other demand loans to O'Brien. In May and September 1980, the bank loaned O'Brien a total of $45,000 to cover the costs of renovating the defendant property. As Bank One was confident that he would repay, the bank made another loan to O'Brien in November 1980 for $268,000 secured by a mortgage on the defendant property and other collateral. In June 1981, O'Brien obtained another loan from Bank One for $290,000, which he indicated was primarily for renovation of other rental properties, and the remainder of which would finance renovation of the defendant property. This loan was secured by mortgages on properties other than the defendant property.

On August 21, 1981, without the knowledge or consent of Bank One, O'Brien and his wife, Karen O'Brien,

deeded the defendant property to an entity called the Heidi Development Corporation ("HDC"), which O'Brien controlled. O'Brien nevertheless continued to seek loans from Bank One using the defendant property as collateral. Bank One loaned O'Brien $920,000 in September 1981, secured in part by the defendant property (which Bank One estimated at the time to be worth $160,000). The bank loaned O'Brien $421,000 in February 1982, secured in part by a third mortgage on the defendant property. On June 21, 1982, O'Brien promised Bank One a payment of $120,000 in exchange for a release of the mortgages on the defendant property. O'Brien also promised to sell the defendant property and other real estate in order to reduce his indebtedness to Bank One below one million dollars. The bank was never paid and no such sale occurred.

When Bank One learned in August 1984 that Franklin County, Ohio had initiated an action against O'Brien for delinquent taxes, it identified O'Brien as a risk and rated his account as a "problem loan." By January 1987, the bank's relationship with O'Brien had significantly deteriorated due to the bank's inability to collect on his delinquent accounts. At this point O'Brien owed the bank approximately $1.5 million.

Also in 1987, O'Brien's legal secretary, Tammy Cordell, went to one of Bank One's branches to attempt to secure three satisfactions of mortgage. Apparently she did not involve either Philip Parker or David Pearce, who had handled O'Brien's prior transactions with the bank, in this particular transaction. The mortgage satisfactions that she obtained showed the signatures of Dean Lucas, a branch manager, and Patrick Hughes, another branch

employee who ostensibly signed as a witness. The satisfactions reflected that they were executed on March 30, 1987. They were not recorded, however, until three months later, on June 2, 1987. When the releases were finally recorded, they reflected satisfactions of the three notes on the defendant property, for $920,000, $421,500, and $268,000, respectively. Hughes later testified at the probable cause hearing that he could not remember signing any mortgage releases for these sums. He testified that Lucas was not authorized to release any mortgage exceeding $30,000, and that he would have remembered if Lucas had released any mortgages in excess of that amount.

In between the execution and recording dates of the releases, and unbeknownst to Bank One, the defendant property was deeded from HDC to Drycreek Corporation, which O'Brien also controlled. In November 1987, O'Brien led Parker and Pearce to believe that he had arranged an arms' length sale of the defendant property to an entity called Hicks Development Corporation for $125,000. Neither knew at the time that O'Brien had already transferred title to the property some six years earlier. Based on O'Brien's representations, Bank One took $125,000 to be the market value of the property and accepted $112,500 in cash and a one-year $12,500 note, later changed to a $6,250 note, from O'Brien in exchange for releases of the mortgages on the defendant property. Those mortgage releases were never recorded and no sale of the property to Hicks Development Corporation ever transpired. O'Brien simply funneled hundreds of thousands of dollars of funds from other sources through

Ohio bank accounts that he controlled, eventually converting them into cashier's checks with the remitter listed as "Hicks Development Corporation" to resemble proceeds of an arms' length sale.

On November 30, 1990, Drycreek Corporation, then the record owner, deeded the defendant property to Charles A.P. Guillaume ("Guillaume"), who at one time had been the boyfriend of O'Brien's daughter, Kelly. The signature "Pamela Mahaffey," the name of O'Brien's former secretary, appeared on the deed with a notary stamp. Mahaffey testified that she never notarized the deed. A second deed, which appeared to be a photocopy of the first, but which added the word "Trust" after "Guillaume," was filed. Guillaume himself had no knowledge of this "trust." He testified that he neither owned the defendant property, nor served as trustee of the property, nor had any dealings with Winterhaven Trust, to whom the property was later transferred. He was completely unaware that the defendant property had been transferred to him by the Drycreek Corporation, and never saw the deed transferring the property to him until it was shown to him at his deposition. Guillaume also testified that both Kelly and her father told him that the Drycreek Road property belonged to O'Brien. On January 21, 1993, Tammy Cordell, acting as trustee for the Charles A.P. Guillaume Trust, deeded the defendant property to the Winterhaven Trust, R.J. Adams/Trustee.

Between the dates of the transfers of the defendant property from Drycreek Corporation to Charles A.P. Guillaume Trust, and then to Winterhaven Trust, a woman by the name of Joyce Farley worked for and lived with O'Brien. Farley testified that O'Brien forged names

and created and used signature stamps in other persons' names, and that he had admitted to her that he filed fraudulent mortgage releases. She testified that he told her that it was "easy" to file the fraudulent releases because "[b]anks, basically, were stupid."

O'Brien's own daughter, Holly, corroborated Farley's testimony regarding his unauthorized use of signature stamps. From 1983 to 1988, Holly worked for her father and signed checks at his direction on a number of different accounts. She testified that she believed O'Brien had forged her name to legal documents without her consent by using her signature stamp without her knowledge.

Russell J. Adams, the Trustee of Winterhaven Trust, indicated that he first learned that he had been named Trustee on January 21, 1993, when Tammy Cordell asked him to notarize the deed transferring the defendant property to Winterhaven Trust from the Charles A.P. Guillaume Trust. Apparently no one asked him to serve as Trustee; Adams simply observed upon notarizing the deed that he was already named Trustee in the document. Adams testified that he never possessed any trust documents and was never paid as Trustee. Any information he had about the Trust came from O'Brien, and to Adams' knowledge, the only property involved in the Trust was the defendant property. Adams, as Trustee, received no correspondence relating to the Trust other than a letter from O'Brien's former attorney, nor did he ever receive any lawsuits, liens or other notices regarding the defendant property.

When Adams notarized Tammy Cordell's signature on the deed transferring the defendant property from the

Charles A.P. Guillaume Trust to the Winterhaven Trust, he had no idea what the Guillaume Trust was. Adams only learned from O'Brien who the beneficiaries of the Winterhaven Trust were (i.e., O'Brien's children) after the seizure of the defendant property and 60 days before his own deposition. Adams never spoke to the children in his capacity as Trustee.

B. Seizure and forfeiture of the defendant property

On September 16, 1993, a federal grand jury for the Southern District of Ohio returned an indictment against O'Brien alleging fourteen counts of bank fraud under 18 U.S.C. §§ 1344 and 2, four counts of money laundering in violation of 18 U.S.C. §§ 1957 and 2, and one forfeiture count under 18 U.S.C. § 982 involving criminal proceeds of $219,569.81 (property other than the real estate involved in this civil forfeiture action). In the criminal case, the United States applied for and was granted a Temporary Restraining Order (TRO) by the district court to restrain the property named in the indictment and any substitute assets that would satisfy the $219,569.81 alleged to have been laundered.[1] The TRO was ultimately converted into a Preliminary Injunction by the district court on October 20, 1993.

Also on September 16, 1993, the United States filed a complaint for civil forfeiture alleging that the defendant

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[1] Among other items, the order restrained personal property located in the house, guest house, and shed on the defendant property, and restrained construction supplies allegedly stored in the garage.

property was forfeitable pursuant to 18 U.S.C. § 981 because it was property involved in money laundering, in violation of 18 U.S.C. § 1956, and in a scheme to defraud banks, in violation of the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA") of 1989, 18 U.S.C. § 1344. The complaint asked the court for an arrest warrant in rem to arrest and seize the property. The same day, the Magistrate Judge ordered the arrest of the property and ordered that notice of the action be given in The Newark Advocate, a newspaper of general circulation in the Southern District of Ohio. Service was effected on the defendant property that day, and on Charles O'Brien on September 17, 1993.

On January 23, 1995, O'Brien appeared before the district court and pleaded guilty pursuant to a Plea Agreement. He pleaded guilty again in August 1995 to a Superseding Plea Agreement. Under both agreements he also pleaded guilty to the criminal forfeiture count, which involved property other than the parcel at issue here. In this civil forfeiture case, on June 23 and 26, 1995, the Magistrate Judge held an after-the-fact probable cause hearing regarding the seizure of the defendant property. The Magistrate Judge later issued a Report and Recommendation finding that the United States had demonstrated probable cause to forfeit the defendant property and finding that exigent circumstances warranted seizure of the defendant property prior to notice and hearing.

After receiving objections only from O'Brien and not Winterhaven Trust, the district court adopted the Magistrate Judge's Report and Recommendation. The United States then filed a motion for summary judgment, which

the district court granted after receiving responses from neither O'Brien nor Winterhaven Trust.

II. DISCUSSION

Before reaching the merits of the appeal, we shall briefly address the jurisdictional problem presented by claimant Winterhaven Trust's failure to object to the Magistrate's Report and Recommendation.

A. Winterhaven Trust's Waiver of Appeal

The government argues that Winterhaven Trust should be dismissed from this appeal as it failed to object to the Magistrate's Report and Recommendation finding probable cause for the forfeiture. The Sixth Circuit established in *United States v. Walters* that failure to file objections within ten days to a Magistrate's Report and Recommendation constitutes waiver of the right to appeal. *United States v. Walters*, 638 F.2d 947, 949-50 (6th Cir.1981) (footnote omitted); *see also Thomas v. Arn*, 474 U.S. 140, 153-55, 106 S.Ct. 466, 474-75, 88 L.Ed.2d 435 (1985) (affirming 6th Cir. rule).

The court of appeals may, however, excuse default in the interests of justice. Accordingly, we have declined to apply the waiver rule in circumstances essentially analogous to the circumstances in which the "interests of justice" exception to the "plain error" rule of Federal Rule of Criminal Procedure 52(b) would apply. *See Thomas*, 474 U.S. at 155, 106 S.Ct. at 475 & n. 15. In other words, we decline to apply the waiver rule where the district court's

error is so egregious that failure to permit appellate review would work a miscarriage of justice.

In the instant case, the Magistrate Judge's Report and Recommendation stated, in no uncertain terms:

> If any party seeks review by the District Judge of this Report and Recommendation, that party may, within ten (10) days, file and serve on all parties objections to the Report and Recommendation . . . The parties are specifically advised that failure to object to the Report and Recommendation will result in a waiver of the right to de novo review by the District Judge and of the right to appeal the decision of the District Court adopting the Report and Recommendation.

The Magistrate's Report was filed on October 3, 1995. Claimant O'Brien did not file objections to the Magistrate's Report until October 23, 1995, after the filing deadline. The district court issued an order adopting the Magistrate's Report and Recommendation on October 25, 1995, apparently unaware of O'Brien's untimely filing. The court subsequently vacated its order to consider O'Brien's objections and allow the United States time in which to file a response to his objections. After receiving the government's reply, O'Brien filed a reply brief on August 8, 1996. Between August and October 1996, the case was transferred from the docket of Judge Dlott to Judge Beckwith. Having fully considered O'Brien's objections, Judge Beckwith issued an order on March 21, 1997 adopting the Magistrate's Report and Recommendation. In light of the district court's decision to allow O'Brien's late filing of objections, Winterhaven Trust would have had ample opportunity to advance its own objections.

Moreover, considering that almost a year and a half elapsed before the court issued a final order, Winterhaven Trust slept on its rights. We therefore conclude that the Trust waived its opportunity to appeal and is hereby dismissed. We note in passing that the district court's grant of summary judgment for the defendant was directed in part by its finding that claimant O'Brien "has never established that he has either any ownership or possessory interest in the property." But as the government concedes that O'Brien was the "actual owner" and "had a significant interest in the defendant property," we find he has standing to bring this appeal.

B. Excessive penalty, failure to stay forfeiture proceeding, and grant of summary judgment

We dispose expeditiously of the arguments that forfeiture of the defendant property violated the Eighth Amendment's prohibition against excessiveness and disproportionality, and that the district court erred in failing to grant a stay of the forfeiture proceedings while criminal charges were pending against O'Brien. Because only Winterhaven Trust raised these arguments and has now been dismissed from the appeal, these two issues are eliminated from our consideration. In addition, only the Trust, and not O'Brien, appeals the district court's finding of probable cause for forfeiture and its grant of summary judgment on the forfeiture to the government.[2] Dismissal

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[2] In its order of June 17, 1997, the district court held that because both O'Brien and Winterhaven Trust failed to respond to the United State's motion for summary judgment, they failed to meet their burden of submitting sufficient credible evidence

of the Trust from this appeal therefore also eliminates these issues from our consideration. The only remaining issues are the propriety of the ex parte seizure and the appropriate remedy for any impairment of claimant O'Brien's rights.

C. Propriety of ex parte seizure

O'Brien contends on appeal that the district court erred in granting the United States' motions for ex parte seizure, and that the appropriate remedy is to set aside the forfeiture and dismiss the case. We review a grant of summary judgment in a forfeiture action de novo, viewing the facts in the light most favorable to the non-moving party. *United States v. Certain Real Property Located at 16510 Ashton, Detroit, Wayne County, Michigan*, 47 F.3d 1465, 1468-69 (6th Cir.1995) (finding violation of claimant's right to pre-seizure hearing dispositive and declining to address remaining issues); *United States v. $53,082 in United States Currency*, 985 F.2d 245, 248 (6th Cir.1993).

Relying upon the Supreme Court's decision in *United States v. James Daniel Good Real Property*, 510 U.S. 43, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993), O'Brien submits that ex parte seizure of the defendant property deprived him of due process. The September 16, 1993 seizure in this case predated the *Good* decision. Hence, the government acted

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such that a reasonable jury could find by a preponderance of the evidence that the claimants were entitled to the property. *See United States v. Real Property*, 941 F.2d 1428, 1439 (11th Cir.1991) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986)).

in compliance with then-existing law by seizing the property only after obtaining a warrant of arrest in rem based on an ex parte showing of probable cause before a neutral magistrate judge. Our analysis must nevertheless address *Good*, as this matter was on direct appeal at the time of the *Good* decision. *See Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 96-97, 113 S.Ct. 2510, 2517-2518, 125 L.Ed.2d 74 (1993) (new rule of law applies to pending civil cases on direct appeal); *United States v. Certain Real Property Located at 16510 Ashton*, 47 F.3d 1465, 1470 (6th Cir.1995) (applying *Good*).

The Supreme Court's decision in *Good* concerned whether seizure of real property for purposes of civil forfeiture justifies an exception to the general rule requiring pre-deprivation notice and hearing. *Good*, 510 U.S. at 53, 114 S.Ct. at 501. The Court observed that whether such an exception would be warranted in the case of seizure of real property in an ex parte civil forfeiture proceeding would require "examination of the competing interests at stake, along with the promptness and adequacy of later proceedings." *Id.* The Court employed the *Mathews v. Eldridge* three-part inquiry balancing (1) the private interest at stake; (2) the risk of erroneous deprivation of that interest through the procedures used and the probable value of additional safeguards; and finally, (3) the Government's interest, including the administrative burden that additional procedural requirements would impose. *Id.* (citing *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976)). Based upon the "historic and continuing" importance of the private interest at stake – the right to be free from governmental

interference – and the absence of any convincing countervailing government needs, the Court held that, absent exigent circumstances, the Due Process clause requires the government to provide notice and a meaningful opportunity to be heard before seizing real property subject to civil forfeiture. *Good*, 510 U.S. at 54, 62, 114 S.Ct. at 501, 504.

The circuits are not in agreement as to the appropriate remedy where an individual did not receive both pre-deprivation notice and a hearing as required by *Good*. *See United States v. Marsh*, 105 F.3d 927, 931 (4th Cir.1997); *United States v. All Assets and Equipment of West Side Bldg. Corp.*, 58 F.3d 1181, 1193 (7th Cir.1995). O'Brien argues in his brief that the appropriate remedy for a *Good* violation is to set aside the forfeiture and dismiss the case with leave to file a new action if the statute of limitations has not run.[3] *See United States v. One Parcel of Real Property, Located at 9638 Chicago Heights*, 27 F.3d 327, 330 (8th Cir.1994); *United Sates v. Property Identified as Lot 718*, 20 F.Supp.2d 27, 39 (D.D.C.1998) (concluding only dismissal would afford meaningful relief when property seized is owner-occupied). The majority of circuits that have addressed this issue, however, have held that a *Good* violation does not invalidate forfeiture; instead, the government must pay the claimant any damages, such as lost profits or rents, that accrued during the period of the illegal seizure. *See e.g., United States v. Marsh*, 105 F.3d

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[3] Although O'Brien does not address what remedy is warranted where the statute of limitations has run, we are of the opinion that dismissal of the forfeiture under such circumstances would be inappropriate.

927, 931 (4th Cir.1997); *United States v. All Assets & Equipment of West Side Bldg. Corp.*, 58 F.3d 1181, 1193 (7th Cir.1995); *United States v. 20832 Big Rock Drive*, 51 F.3d 1402, 1406 (9th Cir.1995); *United States v. 51 Pieces of Real Property Roswell N.M.*, 17 F.3d 1306, 1315-16 (10th Cir.1994); *United States v. 408 Peyton Road, S.W., Atlanta, Fulton County, Georgia*, 162 F.3d 644, 652 (11th Cir.1998). *See also United States v. Certain Real Property Known as and Located at 1461 West 42nd Street, Miami, Florida*, 998 F.Supp. 1438, 1440-41 (S.D.Fla.1998)(requiring repayment of rents or profits during period of illegal seizure when government voluntarily dismissed forfeiture action after seizing real property without notice or hearing); *United States v. One 1989, 23 Foot Wellcraft Motor Vessel*, 910 F.Supp. 46, 52-53 (D.Puerto Rico 1995), *aff'd*, 125 F.3d 842, No. 97-1220, 1997 WL 603452 (1st Cir.1997), *cert. denied*, ___ U.S. ___, 119 S.Ct. 79, 142 L.Ed.2d 62 (1998) (adopting majority rule and requiring government to return to claimant any rents collected by government during period of illegal seizure of real property).

No panel of the Sixth Circuit has yet addressed the issue of the remedy available for and seizure of real property without pre-deprivation notice and hearing. In *United States v. Real Property Known and Numbered as 429 South Main Street, New Lexington, Ohio*, 906 F.Supp. 1155 (S.D.Ohio 1995), the Southern District of Ohio, on remand from the Sixth Circuit, endorsed the approaches of the Seventh and Ninth Circuits to hold that violations of the pre-deprivation notice and hearing requirement do not mandate that a forfeiture be set aside. *Id.* at 1159. We also are persuaded by the approach of the majority of circuits.

Where, as in O'Brien's case, the government fails to provide pre-deprivation notice and hearing, but the property is found to be subject to forfeiture after the process due has been afforded, the violation does not immunize the property from forfeiture. *408 Peyton Road, S.W.*, 162 F.3d at 652; *see Marsh*, 105 F.3d at 931-32. Rather, the government is responsible for rents and profits of which the claimant was deprived during the period of illegal seizure.[4]

Whether claimant O'Brien is entitled to compensation depends upon whether he indeed suffered a *Good* violation. While the government undeniably seized the defendant property without providing O'Brien pre-deprivation notice or opportunity to be heard, the government contends, and the district court held, that ex parte seizure of the defendant property was warranted under the "exigent circumstances" exception recognized in *Good*. *See Good*, 510 U.S. at 62, 114 S.Ct. at 504.

To demonstrate "exigent circumstances," the government must show that "less restrictive measures – i.e., a lis pendens, restraining order, or bond – would not suffice to protect the Government's interests in preventing the sale, destruction, or continued unlawful use of the real property." *Id.* In *Good*, some four and a half years after seizing drugs and drug paraphernalia from the claimant's home, and after securing a guilty verdict against the claimant,

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[4] The period of illegal seizure may be measured from the date of the illegal seizure itself until the time seizure of the property would have become constitutional, the date of the adversary hearing. *See Certain Real Property Known as and Located at 1461 West 42nd Street, Miami, Florida*, 998 F.Supp. at 1440.

the government filed an in rem action seeking to forfeit the claimant's house and the land on which it was situated. *Id.* at 46-47, 114 S.Ct. at 497-98. The government sought forfeiture under 21 U.S.C. § 881(a)(7) on the ground that the property had been used to commit or facilitate the commission of a federal drug offense. *Id.* On August 18, 1989, the Magistrate Judge issued a warrant of arrest in rem authorizing seizure of the property, based on an affidavit recounting Good's conviction and describing the evidence discovered in his home by the police four and a half years earlier. The Supreme Court concluded that the government made no showing of "exigency" to justify postponement of pre-seizure notice and hearing. *Id.* at 62, 114 S.Ct. at 505.

The two cases in which this Circuit has meaningfully addressed *Good* violations also involved civil forfeitures under 21 U.S.C. § 881(a)(7). *United States v. Certain Real Property Located at 16510 Ashton, Detroit, Wayne County, Michigan*, 47 F.3d 1465 (6th Cir.1995) involved civil forfeiture proceedings against properties that a former owner allegedly used in drug transactions. The government claimed that while executing search warrants in July 1992, federal agents found drug paraphernalia on the properties. *Id.* at 1467. Although no criminal charges were brought against the former owner as a result of these searches, the government still sought forfeiture of the properties and seized them without giving to the owner of record either notice or an opportunity to contest the seizure. *Id.* at 1467-68. We reversed the district court's summary judgment for the United States, holding that the owner of record was entitled to pre-seizure notice and hearing. *Id.* at 1470-72. *United States v. Real Property*

Known and Numbered as 429 South Main Street, New Lexington, Ohio, 52 F.3d 1416 (6th Cir.1995) involved civil forfeiture proceedings against the claimant's home, out of which on three occasions in August 1991 he sold marijuana to a confidential informant. *Id.* at 1417. We did not determine whether the government deprived the claimant of his rights under the Due Process clause, but rather remanded the case to the district court to determine whether the government's filing of a lis pendens and execution of an arrest warrant and occupancy agreements effected any seizure that would have required pre-deprivation notice and hearing under *Good*.[5] *Id.* at 1421. Unlike the bank fraud and money laundering offenses at issue in the instant case, both of these prior cases involved criminal conduct comparable to the facts of *Good*. The claimants were suspected or convicted of narcotics offenses that incidentally occurred in or around their homes and the government then sought forfeiture of the homes.

The purpose of the government in seeking forfeiture of real property is "to ensure that the property not be sold, destroyed, or used for further illegal activity prior to the forfeiture judgment." *Good*, 510 U.S. at 58, 114 S.Ct. at 503. The Supreme Court observed in *Good* that real property "by its very nature, can be neither moved nor concealed." *Good*, 510 U.S. at 53, 114 S.Ct. at 500. Therefore in the vast majority of cases, as in *Good* and in *Certain Real Property Located at 16510 Ashton*, measures short of

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[5] On remand, the district court held that there was no "seizure" of the claimant's property. *United States v. Real Property Known and Numbered as 429 South Main Street, New Lexington, Ohio*, 906 F.Supp. 1155, 1158-59 (S.D.Ohio 1995).

outright seizure, such as the filing of a lis pendens, will suffice to notify third parties of the pending forfeiture proceedings and the government's interest in the property. In *Good*, the Supreme Court distinguished seizures of real property from seizures of personal property by the ability of the personal property owner to frustrate forfeiture by removing, destroying, or concealing the property, which "create[s] a 'special need for very prompt action' that justifie[s] the postponement of notice and hearing until after the seizure." *Good*, 510 U.S. at 52, 114 S.Ct. at 500 (citations omitted). The urgency of the government's need to exert control over the property arises from this substantial possibility of conversion. *See All Assets and Equipment of West Side Bldg. Corp.*, 58 F.3d at 1192-93.

In the instant case, the district court concluded that the government faced a similarly urgent situation – a substantial possibility that the defendant real property might somehow be "converted" or somehow placed forever beyond its reach – that justified immediate seizure without notice to the claimant. First, we note that defendant property was apparently claimant O'Brien's residence and the government concedes that O'Brien had a significant interest in the property. Seizure of the house and land would give the government the right to prohibit sale, evict its occupants, modify the property, condition occupancy, receive rents, and supersede the owner in all rights pertaining to use, possession and enjoyment of the property. *See Good*, 510 U.S. at 54, 114 S.Ct. at 501. While we agree that the private interest at stake here was substantial, we also recognize that O'Brien's interest in the property is distinguishable from the interests of the claimants in *Good, Certain Real Property Located at 16510*

Ashton, and *Real Property Known and Numbered as 429 South Main Street* because O'Brien actively attempted to conceal his ownership of the property by deeding it to a series of other nominal owners.

The district court found that exigent circumstances existed which excused preseizure notice. The Supreme Court in *Good* held "[u]nless exigent circumstances are present, the Due Process Clause requires the Government to afford notice and a meaningful opportunity to be heard before seizing real property subject to civil forfeiture." *Good*, 510 U.S. at 62, 114 S.Ct. at 505. In order to establish the existence of exigent circumstances, the government must demonstrate that means less restrictive than an ex parte seizure – including the filing of a lis pendens, restraining order, or bond – would not adequately protect the Government's interests in preventing the sale, destruction, or continued unlawful use of the real property. *See id*; *408 Peyton Road* S.W., 162 F.3d at 651. The government presented evidence that between 1981 and 1993, O'Brien four times orchestrated transfers of the defendant property to sham entities or involuntary trusts without Bank One's knowledge or consent. The government showed that in 1987, he twice obtained fraudulent releases for the mortgages on the property and even recorded the mortgage releases that he had forged. The government offered testimony that O'Brien habitually forged other persons' signatures on legal documents without their knowledge or consent. Although the defendant property itself cannot be concealed, the instant case demonstrates extraordinary lengths to which O'Brien went to conceal or obfuscate the ownership of the property. Indeed, concealing ownership of real property was

at the very core of O'Brien's crime both in this case and in the criminal case in which he pleaded guilty to fourteen counts of bank fraud, four counts of money laundering, and one count of criminal forfeiture. Given O'Brien's demonstrated ability to forge mortgage releases, filing a lis pendens would have been of little practical value because such a measure would be inadequate to secure the government's legitimate interests in the property.[6] Given O'Brien's history of forging mortgage releases and transferring title to involuntary trusts, he could easily have forged a release of lis pendens.[7] In that event,

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[6] The dissent contends that this case presents us with circumstances not exigent enough to warrant ex parte seizure because methods beyond simply filing a lis pendens, but short of seizure, would protect the property. The dissent suggests that "diligent review of court files and a requirement of official document inspection prior to removal of any notices, restraining orders, or bonds would have sufficiently safeguarded the subject property until such time as the probable cause hearing on forfeiture was conducted."

The dissent's recommendation, while noble in theory, is too ambitious to succeed in practice. O'Brien's demonstrated efforts to conceal ownership of the defendant property give rise to exigent circumstances precisely because they were both successful and serial. The evidence before us suggests that "diligent review" sufficient to safeguard the defendant property from O'Brien's scams would likely require nothing short of daily visits to the courthouse to review files and documents.

[7] Both the Magistrate Judge and District Court considered how O'Brien utilized the property in committing the criminal activity that made it subject to forfeiture. The district court observed,

> The record in this action is replete with instances in which the claimant has manifested not only his willingness but his ability to effectuate the

regardless of the availability of prior notice or hearing, the government's filing would not prevent O'Brien from transferring the property to a bona fide purchaser who could subsequently mount an innocent owner defense to forfeiture.[8]

> preparation and filing of forged or fraudulent documents purporting to substantively affect title to and interest in real property. To argue that the filing of yet another document [i.e., a lis pendens] would provide adequate security to the United States under these circumstances is to ignore the demonstrated ability of the claimant to defraud and subvert the rights of others in this property. In short, this Court agrees with the Report and Recommendation's conclusion that "the presence of exigent circumstances in this case is sufficient to warrant an exception to the pre-seizure notice and hearing requirement."

(JA 970, citing page 12 of Magistrate's Report and Recommendation).

[8] The Tenth Circuit in *United States v. 51 Pieces of Real Property Roswell N.M.*, 17 F.3d 1306 (10th Cir.1994) rejected a similar argument by the government that the claimant's conviction for a money laundering scheme in which he "frequently transferred title to defendant properties through numerous entities, names and individuals in various states, in an effort to control the properties while keeping them hidden," suggested that given notice of an impending seizure, the claimant "would have launched another level of quit claim deeds and other purported property transfers to other real and fictitious or front entities in yet more attempts to continue to conceal the assets from the United States." 17 F.3d at 1315. We decline to follow *51 Pieces of Real Property* to the extent it held that the government failed to demonstrate that measures short of seizure would have protected their interest in preventing the claimants from concealing their real property assets through subsequent property transfers.

The promptness and adequacy of later proceedings also figure into our analysis. *See Good*, 510 U.S. at 53, 114 S.Ct. at 501. An adversary hearing was held after the fact in which probable cause to forfeit the defendant property was found. The hearing occurred over a year and a half after the seizure. To the extent O'Brien suffered any damages as a result of the duration of the seizure, however, he bears a significant portion of the blame. O'Brien himself protracted the period of time between the seizure and adversary hearing by failing to file a verified claim to the defendant property until almost a year after the seizure (despite reminders by the district court and in spite of his filing numerous other motions in the meantime), and by filing several motions to stay the proceedings. We are not persuaded that the district court erred in holding that the presence of exigent circumstances in this case was sufficient to warrant an exigent circumstance exception to the pre-seizure notice and hearing requirement.

III. CONCLUSION

Having carefully considered the record on appeal, the briefs of the parties, the arguments of counsel, and the applicable law, we DISMISS claimant Winterhaven Trust from this appeal for its failure to object to the Magistrate's Report, and we AFFIRM the district court's holding that exigent circumstances justified the ex parte seizure.

DAUGHTREY, Circuit Judge, concurring in part and dissenting in part.

I concur in the decision dismissing the appeal of the Winterhaven Trust and in the dicta concluding that dismissal of the forfeiture complaint filed against Charles W. O'Brien is not necessarily an appropriate remedy for the *ex parte* seizure of this claimant's property. I write separately, however, to register my protest of the majority's trivialization of cherished due process principles in the remainder of its opinion.

The majority recognizes, as required, the teaching of the Supreme Court in *United States v. James Daniel Good Real Property*, 510 U.S. 43, 48, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993), that "individuals must receive notice and an opportunity to be heard before the Government deprives them of property." Nevertheless, the majority concludes that exigent circumstances excuse an *ex parte* seizure in this case because less intrusive measures "would not suffice to protect the Government's interests in preventing the sale, destruction, or continued unlawful use of the real property." *Id.* at 62, 114 S.Ct. 492.

In order to determine whether invocation of such an exception is justified, we examine the three factors set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976): "the private interest affected by the official action; the risk of an erroneous deprivation of that interest through the procedures used, as well as the probable value of additional safeguards; and the Government's interest, including the administrative burden that additional procedural requirements would impose." As the Supreme Court recognized in *Good*, an individual's right to maintain control over his or her residence and to be free from governmental interference in the quiet enjoyment of that home "is a private interest of historic and

continuing importance." *Id.* at 53-54, 114 S.Ct. 492. Second, "[t]he practice of ex parte seizure . . . creates an unacceptable risk of error" by affording little or no protection to an innocent property owner. *Id.* at 55, 114 S.Ct. 492. Finally, the governmental interest in pre-notice deprivation of property is extremely small. As the Supreme Court determined, "[b]ecause real property cannot abscond, the court's jurisdiction can be preserved without prior seizure." *Id.* at 57, 114 S.Ct. 492. Additionally, "[s]ale of the property can be prevented by filing a notice of *lis pendens* . . . " and "[i]f there is evidence . . . that an owner is likely to destroy his property when advised of the pending action, the Government may obtain an *ex parte* restraining order, or other appropriate relief, upon a proper showing in district court." *Id.* at 58, 114 S.Ct. 492.

In this case, however, the majority posits that an exception to the general requirement of pre-deprivation notice and a hearing is warranted because the mere filing of a notice lis pendens would have proven futile in protecting the property. According to the majority, O'Brien's history of forging documents to effect illegal property transfers establishes that the claimant would have been able to circumvent the protections established for the property by the filing of a notice lis pendens. I believe, however, that diligent review of court files and a requirement of official document inspection prior to removal of any notices, restraining orders, or bonds would have sufficiently safeguarded the subject property until such time as the probable cause hearing on the forfeiture was conducted. Consequently, I believe the majority erred in concluding that exigent circumstances justify the drastic

measure of depriving an individual of a residence without prior notice or an opportunity to be heard.

Although finding no due process violation in this case, the majority then undertakes the unnecessary task of determining for this circuit what the proper remedy for a violation should be. Such explication is obviously dicta and is of no precedential value in subsequent forfeiture cases. Because I conclude that an egregious due process violation has occurred in this matter, however, I take this opportunity to express my belief that neither the extreme remedy of dismissal of the forfeiture complaint nor the oftentimes insufficient remedy of reimbursement of rent collected by the government is mandated in all cases. Instead, in this matter, had not the claimant refused at oral argument to accept any remedy short of dismissal, a more appropriate measure of damages for the constitutional violation might well have been set at recompense for O'Brien's inconvenience and the cost of the replacement housing he was forced to procure from the time of the improper seizure until the date on which the probable cause hearing was conducted.

Without question, the government has presented compelling evidence of the claimant's criminal wrongdoing. Nevertheless, the bedrock principles of justice and fairness upon which our judicial system is based require that even Charles W. O'Brien receive the process due him before his property is confiscated. In order to preserve those principles, I respectfully dissent from the majority's conclusion that no due process violation has occurred in this matter.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

Civil Action 2:93-CV-893

REAL PROPERTY LOCATED AT 1184 DRYCREEK ROAD, GRANVILLE, OHIO 43023, ET AL.,

Defendant.

REPORT AND RECOMMENDATION

(Filed October 3, 1995)

Plaintiff the United States of America ["United States"] brings this action under 18 U.S.C. §981 for forfeiture of real property located at 1184 Drycreek Road, Granville, Ohio 43023 (the "Heidi House"). This matter is now before the Court on the motions to dismiss for lack of notice and due process and for double jeopardy filed by claimant Charles William O'Brien ["O'Brien"], O'Brien's motion to compel discovery, O'Brien's motion for costs, O'Brien's motion to release property and for sanctions, the motions of the United States to quash subpoenas *duces tecum* of Special Agent Jon DeVries and of Deputy United States Marshal Mark Stroh, and for a determination of probable cause pursuant to United States District Judge Beckwith's Order of June 27, 1994.[1]

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[1] In that Order, Judge Beckwith notified the parties that the Court would schedule a hearing on the motions of claimants

On June 23 and 26, 1995, the Court held a probable cause hearing pursuant to *United States v. James Daniel Good Real Property*, ___ U.S. ___, 114 S.Ct. 492 (1993) (holding that, in the absence of exigent circumstances, the Fifth Amendment due process rights to notice and an opportunity to be heard apply to civil seizure of real property).

Background

The complaint generally alleges that O'Brien knowingly engaged in a scheme to obtain satisfactions of mortgage by fraud from Bank One, Columbus, N.A. ["Bank One"). During the 1970's and 1980's Bank One loaned significant amounts of money to O'Brien and his now ex-wife Karen Sue O'Brien. As of August 1981, Bank One held security interests in properties owned by O'Brien and Karen Sue O'Brien for loans in excess of $1.1 million. In September 1981 O'Brien either forged Karen O'Brien's signature or caused Karen O'Brien to execute a deed, in which he joined to release dower, granting the defendant property to Heidi Development Corporation ["HDC"], a nominee corporation controlled by O'Brien. The complaint further alleges that O'Brien and Karen O'Brien

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Winterhaven Trust [the "Trust"] and of O'Brien for an adversarial hearing on probable cause if the Trust and O'Brien timely filed verified claims. *Order*, at 4-5 (Jun. 27, 1994). Both the Trust and O'Brien have filed their verified claims. *Verified Claim* (July 22, 1994); *Claim for Seized Property and for Possession* (July 26, 1994). Pursuant to United States District Judge Rubin's Order of June, 6, 1995, this matter has been referred to the undersigned for Report and Recommendation. 28 U.S.C. §636(b)(1)(B) ("[A] judge may designate a magistrate to hear and determine any pretrial matter pending before the court . . . ").

thereafter executed two additional mortgage deeds to Bank One securing the defendant property known as Heidi House.

The complaint alleges that, in June 1982, O'Brien used the fraudulent satisfactions to gain control of real estate mortgaged to Bank One. O'Brien allegedly sold a home in Bexley and requested that Bank One release its lien on that home in exchange for payment of $100,000 from the proceeds of the sale. Bank One allegedly agreed, and sent a set of partial releases to O'Brien, who claimed that he had never received it. The complaint alleges that Bank One then sent a second set of partial releases to O'Brien, which were recorded. O'Brien then allegedly fraudulently altered the original partial releases to reflect releases of additional property. According to the complaint, Bank One did not learn of the alleged bank fraud until 1993.

The complaint seeks a determination from the Court with respect to each count that there is probable cause to believe that defendant is properly forfeitable to the United States. The complaint further requests that the forfeiture of defendant to the United States be confirmed, enforced and ordered by the Court, and that the Court thereafter order the United States Marshal to dispose of the defendant as provided by law.

Motions to Quash

At the probable cause hearing, the court granted the United States' motion to quash the subpoena issued by O'Brien to Special Agent Bruce Ponzio. (Tr. at 334). For the reasons articulated at the probable cause hearing, the

United States' motion to quash the subpoena issued by O'Brien to Special Agent Jon DeVries is meritorious. (Tr. at 587-90). Furthermore, because O'Brien never attempted to call Deputy Marshal Stroh to the witness stand, the United States' motion to quash the subpoena issued to Deputy United States Marshal Mark Stroh is moot.

O'Brien's Motion to Compel Discovery

Without referring to any particular discovery requests, O'Brien has filed a motion requesting "that all previous discovery and accounting requested by Mr. O'Brien be compelled and that the Court assess the reasonable costs of this motion." *Motion to Compel and For Costs*, at 2 (Jun. 5, 1995). O'Brien argues that the United States and claimant Bank One have done everything within their power to obstruct O'Brien's discovery in this matter. Fed.R.Civ.P. 37.[2] In its *Memorandum contra Motion*

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[2] Fed.R.Civ.P. 37, which governs the failure to make or cooperate in discovery, provides in part:

> (a) MOTION FOR ORDER COMPELLING DISCLOSURE OR DISCOVERY. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling disclosure or discovery. . . .
>
> (4)(A) If the motion is granted or if the disclosure or requested discovery is provided after the motion was filed, the court shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion. . . .

to Compel (Jun. 23, 1995), the United States summarizes its responses to O'Brien's discovery requests. Given the summary nature of O'Brien's motion to compel, the Court concludes that it is without merit. O'Brien's motion for costs is likewise without merit.

Probable Cause Hearing

At the probable cause hearing, Phillip Parker testified that he has held various positions with Bank One since 1971 and that he had been the loan officer responsible for O'Brien's account with Bank One. Parker summarized Bank One's dealings with O'Brien.[3]

Parker testified that, on January 28, 1980, Bank One made a demand loan in the amount of $85,000 to O'Brien for the purchase of the defendant property. (Tr. at 73). According to Parker, O'Brien had told him that the loan would be repaid by means of permanent financing from Buckeye Federal. Bank One subsequently made demand loans to O'Brien in May and September of 1980 for renovation expenses for the defendant property in the amount of $45,000.[4] (Tr.at 74-75). In November 1980, Bank One took a note from O'Brien in the amount of $268,000 secured by a mortgage on the defendant property. (Tr. at 76-77). Parker testified that in 1980, both he and Bank

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[3] Parker testified with the help of dictation notes that he had made contemporaneously with the events described therein.

[4] It appears that Heidi House had been at least partially destroyed by fire prior to the time that O'Brien purchased it.

One had reached a "high level" of trust and confidence in O'Brien's ability to repay the loans.

In June 1981, O'Brien accepted another loan from Bank One in the amount of $290,000. (Tr. at 79). Parker testified that O'Brien had indicated at the time that he wanted to use the loan proceeds for renovation of rental properties located in Franklin County and, to a lesser extent, for renovation of the defendant property. Parker testified that this loan had been secured by first and second mortgages on the rental properties in Franklin County.

On August 21, 1981, O'Brien and his wife Karen O'Brien, without the knowledge or consent of Bank One, deeded the defendant property to Heidi Development Corporation ["HDC"]. (Gov't Ex. 12). Nevertheless, according to Parker, Bank One in September 1981 loaned O'Brien another $920,000, secured by mortgages on rental properties in Franklin County, OBrien's Bexley home, and the defendant property, which Bank One had estimated at that time to be worth $160,000. (Tr. at 80-82). Bank One loaned O'Brien another $421,500, ostensibly for rental property expenses, in February 1982. (Tr. at 85-86). According to Parker, that loan was secured by a third mortgage on the defendant property.

Parker testified that his notes of June 21, 1982 reflect that O'Brien had promised payment of $120,000.00 in exchange for a release of the mortgages on the defendant property. (Tr. at 88). O'Brien also promised to sell the defendant property and some rental properties in order to reduce his indebtedness to Bank One below one million dollars. (Tr. at 89).

According to Parker, Bank One identified O'Brien as a "problem loan" in August 1984, upon learning that Franklin County had initiated an action for delinquent taxes. (Tr. at 90-91). By January 1987, Bank One's relationship with O'Brien had deteriorated significantly. (Tr. at 93-94).

David Pearce, who also worked for Bank One and who was primarily responsible for the O'Brien account in 1987 and 1988, testified that Bank One's relationship with O'Brien at that time had become "strained" and that the account had been rated as a "problem credit" at that time. (Tr. at 208-09).

Patrick Hughes, who was employed at Bank One from 1986 to 1989, worked at the Hamilton Road branch office of Bank One in 1987. Hughes recalled that Tammy Cordell,[5] formerly a legal secretary for O'Brien, appeared at the Hamilton Road branch bank in 1987 for the purpose of obtaining three satisfactions of mortgage. (Tr. at 196-97). The branch manager at the time, Dean Lucas, signed the mortgage satisfactions. According to Hughes, Lucas was not authorized to release any mortgage exceeding approximately $30,000. (Tr. at 200-02). Hughes, who witnessed the execution of the releases, would have recalled if the amounts had been greater than $30,000.00. (Tr. at 202).

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[5] Although Cordell was called as a witness in this matter, she asserted her right against self-incrimination under the Fifth Amendment and refused to answer questions regarding this and other alleged incidents. (Tr. at 388).

At the time they were recorded, the three satisfactions of mortgage referred to by Hughes purported to relate to the three Bank One mortgages on the defendant property securing the three notes of $920,000, $421,500, and $268,000. (Gov't Exs. 1-4, 1-6, and 1-8). Moreover, although the satisfactions were executed on March 30, 1987, they were not recorded until June 2, 1987. (Gov't Exs. 1-4, 1-6, and 1-8). In the interim, on May 28, 1987, the defendant property was deeded from HDC to Drycreek Corporation. (Gov't Ex. 1-9). Both Parker and Pearce testified that they were unaware that those mortgages had been released. (Tr. at 99, 219).

Both Parker and Pearce also testified that O'Brien told them in November 1987 that O'Brien, without disclosing that title to the defendant property had already been transferred, had arranged an arms length purchase contract with the Hicks Development Company for the defendant property for $125,000.00. (Tr. at 95). According to Parker, Bank One had accepted $112,500 in cash and a one year note for $12,500 from O'Brien in exchange for releases of the mortgages on the defendant property. (Tr. at 99-101). According to IRS Agent DeVries, those mortgage releases have never been recorded. (Tr. at 403).[6]

The evidence reflects that, on November 30, 1990, Drycreek Corporation deeded the defendant property to Charles A.P. Guillaume. (Gov't Ex. 1-10). Although Pamela Mahaffey Nixon, formerly a secretary for O'Brien, testified that she did not notarize that deed (Tr. at 308), a

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[6] The Court notes, too, that nothing in the record indicates that these mortgage releases were recorded.

signature for "Pamela Mahaffey," with a notary stamp, appears on that deed.[7] On January 21, 1993, Tammy Cordell, acting as trustee for the Charles A.P. Guillaume Trust, deeded the defendant property to the Winterhaven Trust, R.J. Adams, Esq., Trustee. (Gov't Ex. 1-12).

Joyce Farley testified that she worked for and lived with O'Brien at the defendant property in 1991 and 1992. (Tr. at 247-49). Farley testified that O'Brien had forged names and had created and used signature stamps of the names of other persons and that he told her that he had filed fraudulent mortgage releases. (Tr. at 247, 260). According to Farley, O'Brien commented to her that he had been able to obtain the releases because banks are "stupid." (Tr. at 260).

Holly O'Brien, daughter of O'Brien, testified that she worked for O'Brien in the apartment business from 1983 to 1988. (Tr. at 430). During that time, she signed checks on a number of different accounts whenever directed to do so by O'Brien. (Tr. at 432, 439, 442). Holly O'Brien further testified that O'Brien has forged her name to legal documents without her consent by means of a signature stamp. (Tr. at 446).

Anthony Gurvis, a resident of Granville, Ohio, testified that, when he inquired about purchasing the defendant property in 1992, O'Brien referred him to the trustee

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[7] Pamela Mahaffey took the last name of Nixon upon her marriage in March 1988. (Tr. at 305). She testified that she continued to act as a notary public thereafter, and that, consistent with instructions from the Clerk of Courts, she had simply written "Nixon" after "Pamela Mahaffey" when notarizing a document after her marriage. (Tr. at 305).

of the Trust, R.J. Adams. According to Gurvis, Adams made a genuine effort, though without success, to negotiate the sale of the defendant property. (Tr. at 59).

The deposition of Charles A.P. Guillaume was admitted into evidence at the probable cause hearing. Guillaume testified that he has never owned any property, including the defendant property, and has never been a trustee of a trust. (Guillaume Depo. Tr. at 18). Guillaume testified that he was unaware that the defendant property had been transferred to him, and that he had never before seen the deed transferring the property to him from Drycreek Corporation (Guillaume Depo. Ex. 1) or the deed transferring the property from Drycreek Corporation to the Charles A.P. Guillaume Trust (Guillaume Depo. Ex. 2). (Guillaume Depo. Tr. at 21, 23). Guillaume further testified that he has never had any dealings with the Winterhaven Trust and that O'Brien told Guillaume that the defendant property belonged to O'Brien. (Guillaume Depo. Tr. at 22, 26).[8]

Motions to Dismiss

As the basis for his corrected motion to dismiss,[9] O'Brien argues that the prehearing seizure of the

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[8] Ronald L. Winrod also testified at the hearing. (Tr. at 336-376). O'Brien objected to his testimony, *inter alia*, on the basis that the United States failed to timely notify O'Brien that Winrod would testify at the hearing. The Court indicated that it would take O'Brien's objection under advisement. (Tr. at 346). For purposes of this Report and Recommendation, the Court has not considered Winrod's testimony.

[9] O'Brien filed his original motion, entitled "Motion to Dismiss (Notice, Due Process, Jurisdiction)", on May 26, 1995.

defendant property failed to comply with the holding in *United States v. James Daniel Good*, 114 S.Ct. 492, and was therefore unconstitutional. The United States concedes that *Good* applies where, as here, the forfeiture action was not final at the time that the Supreme Court rendered its decision in *Good*. However, the United States argues that O'Brien is without standing to challenge the seizure in this instance because he was not a claimant at the time of the *Good* decision.

In *United States v. Certain Real Property Located at 16510 Ashton*, 47 F.3d 1465 (6th Cir. 1995), the United States instituted an *in rem* forfeiture action pursuant to 18 U.S.C. §881(a)(6) and (a)(7) against two properties allegedly connected with drug trafficking operations, and seized the property without a prior adversary proceeding. The Court of Appeals found it significant to note that the United States had not instituted any related criminal charges. *16510 Ashton*, 47 F.3d at 1467-68. Raymond Durr, who apparently had no involvement with the alleged drug operations, filed a verified claim as owner of both properties on September 1, 1992, and filed an answer on September 21, 1992.

The Court of Appeals for the Sixth Circuit held that the United States had violated Durr's Fifth Amendment due process right to a pre-seizure hearing as required by *United States v. Good, supra*. The Court noted that, unlike the facts in *Good*, no exigent circumstances were present with respect to Durr. *16510 Ashton*, at 1471. The Court

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O'Brien filed his "Corrected Motion to Dismiss (Notice, Due Process, Jurisdiction)" on June 9, 1995.

also recognized that Durr had been the owner at the time of the seizure, and that, "whether or not he proves to be a straw man at the hearing, as the record title holder, he is entitled to notice and a hearing before being deprived of his interest in the property." *16510 Ashton*, at 1471.

Unlike the claimant Durr in *16510 Ashton*, O'Brien was not the owner of the defendant property at the time of the seizure. Moreover, as the United States properly submits, the presence of exigent circumstances in this case is sufficient to warrant an exception to the pre-seizure notice and hearing requirement. Specifically, the complaint alleges, and the evidence reflects, that O'Brien has a history of fraudulently obtaining satisfactions of mortgage and fraudulently transferring title to the defendant property. Accordingly, the Court concludes that O'Brien's motion to dismiss is without merit.

For these same reasons, O'Brien's motion for sanctions under Fed.R.Civ.P. 11[10] on the basis that the

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[10] Fed.R.Civ.P. 11, which governs the signing of papers and sanctions related thereto, provides in part:

> (b) REPRESENTATIONS TO COURT. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, –
>
> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay . . .
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law

property was seized by the United States without prior notice and in bad faith, is also without merit.

Referring to his prosecution before Judge Beckwith in Case No. CR-2-93-152, O'Brien also seeks dismissal of this action on the ground of double jeopardy. Judge Beckwith dismissed this same claim asserted by O'Brien in that criminal action and, for the same reasons, O'Brien's motion to dismiss on the ground of double jeopardy in this civil action is without merit.

Determination of Probable Cause

18 U.S.C. §981, which governs civil forfeiture, provides in pertinent part:

> (a)(1) . . . [T]he following property is subject to forfeiture to the United States:
>
> > (A) Any property, real or personal, involved in a transaction or attempted transaction in violation of . . . section 1956 or 1957 of this title, or any property traceable to such property. . . .

> or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law . . .
>
> * * *
>
> (c) SANCTIONS. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

* * *

> (C) Any property, real or personal, which constitutes or is derived from proceeds traceable to a violation of . . . section 1344. . . .

The United States contends that there was probable cause for seizure of the property both under Count I, laundering money with the intent to carry on bank fraud in violation of 18 U.S.C. §1956,[11] and under Count III, executing or attempting to execute a scheme to defraud banks in violation of the Financial Institutions Reform,

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[11] 18 U.S.C. §1956, which governs the crime of money laundering, provides in pertinent part:

> (a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity –
>
> > (B)(i) knowing that the transaction is designed in whole or in part to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity;
> >
> > * * *
>
> shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.
>
> (c)(4) [T]he term "financial transaction" means (A) a transaction which in any way or degree affects interstate or foreign commerce . . . involving the transfer of title to any real property. . . .

Recovery, and Enforcement Act ["FIRREA"] of 1989. 18 U.S.C. §1344.[12]

The United States bears the burden of proving probable cause for seizure of the property. *United States v. One 1957 Rockwell Aero Commander 690 Aircraft*, 671 F.2d 414, 417 (10th Cir. 1982); *United States v. Puello*, 814 F.Supp. 1155 (E.D.N.Y. 1993). Probable cause requires a finding upon review of the entire record of *prima facie* evidence of guilt; mere suspicion is not sufficient. *United States v. Liscum Drive*, 866 F.2d 213, 216 (6th Cir. 1989). Hearsay evidence is admissible at a probable cause hearing. *United States v. 429 S. Main Street*, 843 F.Supp. 337, 341 (S.D. Ohio 1993) (citations omitted), *aff'd in part, rev'd in part on other grounds*, 52 F.3d 1416 (6th Cir. 1995).

The Court will first consider whether there is probable cause to seize the defendant property under Count III of the complaint, in which the United States alleges that the defendant property was obtained by means of bank fraud in violation of 18 U.S.C. §1344. The United States contends that the bank fraud was the scheme to deceive

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[12] 18 U.S.C. §1344, which governs the crime of bank fraud, provides:

> Whoever knowingly executes, or attempts to execute, a scheme or artifice –
>
> (1) to defraud a financial institution; or
>
> (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;
>
> shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

Bank One into releasing collateral from its mortgages with the intent of exposing the bank to actual or potential loss. *See United States v. Stavroulakis*, 952 F.2d 686 (2d Cir.), *cert. denied*, 504 U.S. 926 (1992).

The Court must determine whether there is *prima facie* evidence to support a finding of such a scheme in this instance. O'Brien contends that the evidence does not rise above mere suspicion. However, the mortgage satisfactions (Gov't Exs. 1-4, 1-6, and 1-8) and the testimony of Parker, Pearce, and Hughes are evidence that the mortgages were released fraudulently. The testimony of Holly O'Brien and Joyce Farley are evidence that O'Brien obtained the mortgage releases with the intent to defraud Bank One.

The Court holds that there is *prima facie* evidence demonstrating that the defendant property was used in a scheme to defraud Bank One in violation of 18 U.S.C. §1344. Accordingly, it is recommended that the Court find that there is probable cause for seizure of the defendant property under Count III of the complaint.

The Court next will consider whether there is probable cause for seizure of the defendant property under Count I of the complaint, in which the United States contends that the defendant property represents the proceeds of bank fraud in violation of 18 U.S.C. §1956. The United States contends that money laundering occurred by means of the transfers of title to the defendant property from HDC to Drycreek, from Drycreek to Charles A.P. Guillaume, from Drycreek to the Charles A.P. Guillaume Trust, and from the Charles A.P. Guillaume Trust to the Winterhaven Trust, R.J. Adams, Esq., Trustee.

The evidence reflects that O'Brien dealt with Bank One throughout the events described herein, and that O'Brien purposefully withheld from Bank One information that he had deeded the defendant property to another. There is evidence that O'Brien arranged the loans and secured the unrecorded November 1987 releases of the defendant property. Although O'Brien denies responsibility for securing the satisfactions of mortgage in May 1987 at the Hamilton Road Bank One branch, the United States presented evidence through the testimony of Holly O'Brien, Guillaume, and Farley that Cordell acted under the direction and control of O'Brien.

The evidence reflects that there is probable cause to believe that the transfers, or attempted transfers, of title to the defendant property were money laundering transactions in violation of 18 U.S.C. §1956. Accordingly, it is recommended that the Court find that there is probable cause to believe that the defendant property constitutes proceeds of bank fraud in violation of 18 U.S.C. §981(a)(1)(A).

Conclusion

For the foregoing reasons, it is RECOMMENDED that the Court FIND that there is probable cause to support the forfeiture of the defendant property. It is further RECOMMENDED that claimant O'Brien's motion to compel discovery be DENIED; that O'Brien's motion for costs be DENIED; that the United States' motions to quash the subpoenas of Special Agent Ponzio and Special Agent DeVries be GRANTED; that the United States' motion to

quash the subpoena of Deputy Marshal Stroh be dismissed as MOOT; that O'Brien's motions to dismiss be DENIED; and that O'Brien's motion for sanctions be DENIED.

If any party seeks review by the District Judge of this *Report and Recommendation*, that party may, within ten (10) days, file and serve on all parties objections to the *Report and Recommendation*, specifically designating this *Report and Recommendation*, and the part thereof in question, as well as the basis for objection thereto. 28 U.S.C. §636(b)(1).

The parties are specifically advised that failure to object to the *Report and Recommendation* will result in a waiver of the right to *de novo* review by the District Judge and of the right to appeal the decision of the District Court adopting the *Report and Recommendation*. *See Thomas v. Arn*, 474 U.S. 140 (1985); *Smith v. Detroit Federation of Teachers, Local 231 etc.*, 829 F.2d 1370 (6th Cir. 1987); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).

/s/ Norah McCann King
Norah McCann King
United States
Magistrate Judge

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

1184 DRYCREEK ROAD, GRANVILLE, OHIO 43023, et al.,

Defendants.

Civil Action 2:93-CV-893
Judge Beckwith
Magistrate Judge King

ORDER

(Filed Mar. 21, 1997)

This is a forfeiture action under 18 U.S.C. §981 by which the United States seeks to forfeit real property located at 1184 Drycreek Road, Granville, Ohio, on the ground that transfer or title to the defendant property constituted money laundering or proceeds of bank fraud and is therefore forfeitable under 18 U.S.C. §981(a)(1)(A). Charles William O'Brien ("the claimant") has asserted a claim to the defendant property. After a hearing, the United States Magistrate Judge issued a *Report and Recommendation* recommending, *inter alia*,[1] that the Court find probable cause to support the forfeiture. This matter is now before the Court on the claimant's objections to the *Report and Recommendation*.[2]

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[1] The *Report and Recommendation* also addressed a number of other issues, none of which were objected to by the parties.

[2] The *Report and Recommendation* was initially adopted and affirmed as unopposed. However, on July 12, 1996, the order

The underlying facts giving rise to this action are somewhat complicated and took place over a period of years. Bank One Columbus, N.A., ("the bank"), lent the claimant in excess of $1.1 million, secured by a number of properties owned or controlled by him, including his residence in Bexley, Ohio, a number of rental properties located in Franklin County, Ohio, and the property at issue in this action, which is located in Licking County, Ohio. The claimant, either personally, or more commonly through others, effectuated the fraudulent release of mortgages on the Franklin County properties without the bank's knowledge. Then, in 1987, the claimant led the bank to believe that the Licking County property was to be sold for $125,000.00 in an arm's length transaction which, presumably, reflected the fair market value of the property. The claimant paid approximately $118,000.00 to the bank, in return for which the bank – still believing that the claimant's debt remained secured by the Franklin County rental properties – released its mortgage on the Licking County property at issue in this case. In fact, however, the property remained in the claimant's possession and control.[3] It was only some years later that the bank learned for the first time that satisfactions of mortgage purporting to release the bank's claims to the Franklin County properties had been filed.

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adopting and affirming the *Report and Recommendation* was vacated in light of the petitioner's objections to the *Report and Recommendation*, which has been filed on October 23, 1995.

[3] Actual title to the property has been transferred at various times to nominees of the claimant.

In his objections,[4] the claimant challenges only one factual finding made in the *Report and Recommendation*. The Magistrate Judge stated that two (2) bank officials, Messrs. Parker and Pearce,

> also testified that O'Brien told them in November 1987 that O'Brien, without disclosing that title to the defendant property had already been transferred, had arranged an arm's length purchase contract with the Hicks Development Company for the defendant property for $125,000.00.

Report and Recommendation, at p.8. The claimant argues that neither bank officer testified that the claimant had actually "told" them about the details of the supposed transaction. It is true that Mr. Parker could not recall whether it was the claimant or Mr. Pearce who had notified him of the transaction. *Tr.,* Vol. I, p.95. Although Mr. Pearce was not expressly asked the source of his information regarding this transaction, he testified:

> My understanding was that he [the claimant] was selling the property to Hicks Development Company and we were to receive a check for the proceeds of the sale.

Tr., Vol. II, p.211.

Whether or not the claimant actually "told" the loan officers that the purported sale of the property was an

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[4] The Court notes that the actual title owner of the defendant property, Winterhaven Trust, R.J.Adams, Esq., who was represented at the probable cause hearing by separate counsel, has filed no objections to the *Report and Recommendation.*

arm's length transaction when it in fact was not is immaterial. What is material, and what is clear from the evidence adduced at the probable cause hearing, is that information – whether documentary or verbal – provided by the claimant to the bank's agents led the bank to believe that the defendant property was to be sold and that the purported sale reflected the fair market value of the defendant property. The claimant caused the bank to conclude that, by releasing its mortgage on the property, it was simply exchanging its collateral for the fair market value of that collateral, under circumstances where the bank also believed – erroneously – that its loan to claimant remained secured by the Franklin County properties. In short, the claimant, through his words or actions, affirmatively misled the bank to its detriment. This objection is without merit.

The claimant also objects to a number of legal conclusions contained in the *Report and Recommendation*. The first, (one consistently raised by the claimant throughout these proceedings), relates to the failure to provide him with pre-seizure notice and hearing. In *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993), which was decided some months after the *ex parte* seizure warrant was issued in this case, the United States Supreme Court held that the due process clause of the Fifth Amendment ordinarily requires that notice of an anticipated seizure and opportunity to be heard be made prior to the seizure. The Court also recognized, however, that under appropriate, exigent circumstances, pre-seizure notice and opportunity to be heard need not be given.

The *Report and Recommendation* reasoned, alternatively, that, because the claimant was not the record

owner of the property, he was not entitled to the *Good* pre-seizure rights, and that, in any event, there existed exigent circumstances that justified failure to comply with the notice and hearing requirements of *Good*. Because the Court agrees that this case presents exigent circumstances, the Court will not address the claimant's contention that he was among the class of persons entitled to pre-seizure notice and opportunity to be heard.

The claimant argues that the

> ability [of the United States] to file a notice of *lis pendens* (*see* 28 U.S.C. §1964; Ohio Civil Rule 3(F); and Ohio Revised Code §§2703.26 and 2703.27) can prevent a sale or transfer of the real property until the forfeiture proceedings commence.

Objections of Claimant Charles William O'Brien to Magistrate's Report and Recommendation, at 4. With the notice of *lis pendens*, "it would have been virtually impossible for anyone but a federal judge to remove it because it would require not only the forging of the federal judge's signature, but also filing by federal court clerk, thus making the filing of a notice of *lis pendens* tampersafe." *Reply to Plaintiff's Response to Charles William O'Brien's Objections to the Report and Recommendation of the Magistrate Judge*, at 4.

The record in this action is replete with instances in which the claimant has manifested not only his willingness but his ability to effectuate the preparation and filing of forged or fraudulent documents purporting to substantively affect title to and interests in real property. To argue that the filing of yet another document would provide adequate security to the United States under

these circumstances is to ignore the demonstrated ability of the claimant to defraud and subvert the rights of others in this property. In short, this Court agrees with the *Report and Recommendation's* conclusion that "the presence of exigent circumstances in this case is sufficient to warrant an exception to the pre-seizure notice and hearing requirement." *Report and Recommendation*, at p.12. The claimant's objection to the *Report and Recommendation*, then, is without merit in this regard.

The claimant also contends that, because final judgment of conviction and sentence has been entered in a related criminal case pending against him, *United States v. Charles William O'Brien*, CR-2-93-152, the double jeopardy clause of the Fifth Amendment to the United States Constitution prohibits this civil forfeiture action. In making this argument, the claimant relies upon the decision of the United States Court of Appeals for the Sixth Circuit in *United States v. Ursery*, 59 F.3d 568 (6th Cir. 1995). That decision, however, has now been reversed by the United States Supreme Court. *United States v. Ursery*, 116 S.Ct. 2135 (1996). This Court expressly concludes that the forfeiture of the defendant property in this action does not constitute successive punishment prohibited by the United States Constitution. The claimant's objection is without merit in this regard.

Finally, the claimant objects to the determination, contained in the *Report and Recommendation*, that the transactions relating to the defendant property constituted money laundering in violation of 18 U.S.C. §1956, as alleged in Count I of the complaint, and that the claimant's intent in connection with those transactions was to expose the bank to actual or potential loss for purposes of

18 U.S.C. §1344, which prohibits schemes to defraud banks, as alleged in Count III of the complaint.

The record more than adequately supports the conclusion of the Magistrate Judge that the transactions effected by claimant were "designed in whole or in part to conceal or disguise the nature, the location, the source, the ownership or the control of the proceeds," 18 U.S.C. §1956(a)(1)(B)(i), and that such actions qualify as the "financial transactions" prohibited by the money laundering statute. 18 U.S.C. §1956(c)(4)(iii).

Count III of the complaint in forfeiture alleges that the purported sale of the defendant property amounted to bank fraud in violation of 18 U.S.C. §1344. The claimant takes the position that, because he paid the bank approximately $118,000.00 in connection with the supposed "sale" of the property, there can be no finding that he acted with intent to expose the bank to actual or potential loss, as required by 18 U.S.C. §1344. However, as the United States points out, there is overwhelming evidence in the record that the claimant himself believed the defendant property to be worth more than $120,000.00. In any event, the transaction at issue in this case was clearly intended by the claimant to defraud the bank by exempting the defendant property from any recourse by the bank. The contention that the record provides no evidence of the claimant's fraudulent intent is specious.

In short, and having carefully considered *de novo* those portions of the *Report and Recommendation* to which the claimant has filed objection, the Court nevertheless determines that the *Report and Recommendation* must be,

and it hereby is, ADOPTED and AFFIRMED in all respects.

The Court specifically HOLDS that there is probable cause to support the forfeiture of the defendant property.

/s/ _____
Sandra S. Beckwith, Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,	:	
PLAINTIFF,	:	Civil Action No. C-2-93-0893
v.	:	JUDGE BECKWITH
REAL PROPERTY LOCATED AT 1184 DRY CREEK ROAD, GRANVILLE, OHIO 43023, ET AL.,	:	Magistrate Judge King
DEFENDANT.	:	

JUDGMENT AND DECREE OF FORFEITURE

(Filed Jul. 31, 1997)

This Court, having read and approved the terms of a Stipulated Settlement Agreement by and between Plaintiff, United States of America (hereinafter "United States") and Claimant, J. Terry Evans, Licking County Treasurer (hereinafter "L.C. Treasurer") on May 30, 1997, and a Stipulated Settlement Agreement by and between the United States and Claimant, Bank One, Columbus, N.A. (hereinafter "Bank One") on July 28th, 1997, and being otherwise fully advised, finds:

1. That this Court has jurisdiction under 28 U.S.C. §§1345 and 1355 over the subject matter and the parties, and the United States' complaint herein states a claim for which relief may be granted;

2. That process was duly issued in this cause and public notice of this forfeiture action against the Defendant real property was given as required by law;

3. That based upon the pleadings and representations of the parties, the Defendant real property was used in a manner proscribed by 18 U.S.C. §981, and said Defendant real property is, therefore, forfeitable to the United States pursuant to the provisions of 18 U.S.C. §981;

4. That the parties hereto have agreed that the claim of the L.C. Treasurer should be allowed to the extent provided and permitted in the Stipulated Settlement Agreement as filed and approved by this Court on May 30, 1997;

5. That the parties hereto have further agreed that the claim of Bank One should be allowed to the extent provided and permitted in the Stipulated Settlement Agreement as filed and approved by this Court on July 28th, 1997; and

6. That the record in this case shows:

a. That Society National Bank, Intervenor-Plaintiff, withdrew their motion to intervene as a party plaintiff on January 13, 1994; and

b. That pursuant to the Opinion and Order entered by this Court on June 17, 1997, summary judgment was granted against Claimants Charles William O'Brien and Winterhaven Trust, R.J. Adams, Trustee.

NOW, THEREFORE, based upon the findings; the Stipulated Settlement Agreements of the parties; and this

Court's Opinion and Order; it is hereby ORDERED, ADJUDGED AND DECREED:

1. That the Defendant real property known and numbered 1184 Dry Creek Road, Granville, Ohio 43023, and legally described as follows:

BEING THE THIRD QUARTER OF TOWNSHIP 3, RANGE 13, U.S. MILITARY LANDS:

Parcel 1

BEING A PART OF A CERTAIN TRACT CONTAINING 44 ACRES WHICH WAS CONVEYED TO ARTHUR F. JONES AND LULO M. JONES BY DEED SHOWN OF RECORD IN DEED BOOK 282, PAGE 581, RECORDER'S OFFICE, LICKING COUNTY, OHIO AND MORE PARTICULARLY DESCRIBED AS FOLLOWS:

BEGINNING AT A POINT IN THE EAST LINE OF THE SAID 44 ACRE TRACT WHICH POINT IS LOCATED AT THE INTERSECTION OF THE SAID EAST LINE WITH THE CENTER LINE OF BRUSHY FORK ROAD; THENCE FROM SAID BEGINNING POINT SOUTH 2 DEG. 00' EAST WITH THE EAST LINE OF THE SAID 44 ACRE TRACT. 591.5 FEET TO A POST AT THE SOUTHEAST CORNER THEREOF, SAID POST BEING ALSO AT THE NORTHEAST CORNER OF A 31 ACRE TRACT OWNED BY JOHN W. DAVIES; THENCE NORTH 83 DEG. 38' WEST WITH THE SOUTH LINE OF THE SAID 44 ACRE TRACT AND THE NORTH LINE OF THE SAID 31 ACRE TRACT, 1287.7 FEET TO AN IRON PIPE; THENCE NORTH 1 DEG. 00' WEST, 681.4 FEET TO A POINT IN THE CENTER LINE OF SAID BRUSHY FORK ROAD, (PASSING AN IRON PIPE AT 666.4 FEET); THENCE SOUTH

89 DEG. 28' EAST WITH THE CENTER LINE OF SAID BRUSHY FORK ROAD, 346.8 FEET TO A POINT; THENCE SOUTH 80 DEG. 43' EAST, CONTINUING WITH THE CENTER LINE OF SAID BRUSHY FORK ROAD, 358.4 FEET TO A POINT; THENCE SOUTH 73 DEG. 14' EAST, CONTINUING WITH THE CENTER LINE OF SAID BRUSHY FORK ROAD, 595.8 FEET TO THE PLACE OF BEGINNING, CONTAINING 19.755 ACRES, BE THE SAME MORE OR LESS, BUT SUBJECT TO ALL LEGAL HIGHWAYS, ZONING LAWS AND ORDINANCES.

PARCEL 2

BEING A TRACT OF LAND IN THE TOWNSHIP OF MCKEAN, COUNTY OF LICKING, STATE OF OHIO, AND BEING A PART OF A CERTAIN TRACT CONTAINING 31 ACRES WHICH WAS CONVEYED TO JOHN W. DAVIES BY CERTIFICATE OF TRANSFER FROM MOWREY C. DAVIES, DECEASED, AS SHOWN OF RECORD IN DEED BOOK 325, PAGE 231, RECORDER'S OFFICE, LICKING COUNTY, OHIO, AND MORE PARTICULARLY DESCRIBED AS FOLLOWS:

BEGINNING AT A POST AT THE NORTHEAST CORNER OF THE SAID 31 ACRE TRACT, WHICH POST IS ALSO AT THE SOUTHEAST CORNER OF A 44 ACRE TRACT OWNED BY ARTHUR F. JONES AND LULO M. JONES; THENCE FROM SAID BEGINNING POINT, SOUTH 2 DEG. 00' EAST WITH THE EAST LINE OF SAID 31 ACRE TRACT, 528.2 FEET TO A POST AT THE SOUTHEAST CORNER THEREOF; THENCE NORTH 84 DEG. 32' WEST, WITH THE SOUTH LINE OF THE SAID 31 -ACRE TRACT, 1294.5 FEET TO A POINT;

THENCE NORTH 1 DEG. 00' WEST, 547.3 FEET TO AN IRON PIPE IN THE NORTH LINE OF THE SAID 31 ACRE TRACT, SAID IRON PIPE BEING ALSO IN THE SOUTH LINE OF THE SAID 44 ACRE TRACT OWNED BY ARTHUR F. JONES AND LULO M. JONES; THENCE SOUTH 83 DEG. 38' EAST, WITH THE NORTH LINE OF THE SAID 31 ACRE TRACT AND THE SOUTH LINE OF THE SAID 44 ACRE TRACT, 1287.7 FEET TO THE PLACE OF BEGINNING, CONTAINING 15.807 ACRES, BE THE SAME MORE OR LESS, BUT SUBJECT TO ALL LEGAL HIGHWAYS, ZONING LAWS AND ORDINANCES.

is forfeited to the United States of America pursuant to 18 U.S.C. §981.

2. That the claim of the L.C. Treasurer should be allowed to the extent provided and permitted in the Stipulated Settlement Agreement as filed and approved by this Court on May 30, 1997.

3. That the claim of Bank One should be allowed to the extent provided and permitted in the Stipulated Settlement Agreement as filed and approved by this Court on July 28th, 1997.

4. That the withdrawal of Society National Bank from this action is acknowledged.

5. That any and all claims of Charles William O'Brien and Winterhaven Trust, R.J. Adams, Trustee, are denied as a result of the Opinion and Order of this Court of June 17, 1997, which granted summary judgment against Charles William O'Brien and Winterhaven Trust, R.J. Adams, Trustee.

6. That any and all claims and interests in and to the above described forfeited real property other than those specifically allowed herein are forever foreclosed and barred, and no right, title or interest in the forfeited property shall exist in any other person or entity, and the United States of America shall have clear title to said property and may warrant good title thereto subject only to the claims specifically allowed herein.

7. That the United States Marshals Service is instructed to dispose of the Defendant real property according to law, and, furthermore, will cause to have transferred and deposited any funds remaining after all costs of this action, sales costs, and claims hereby approved are paid, to the Treasury Asset Forfeiture Fund.

SO ORDERED this 28th day of July, 1997.

/s/ Sandra S. Beckwith
HONORABLE
SANDRA S. BECKWITH
UNITED STATES DISTRICT
COURT JUDGE

Respectfully submitted,

SHARON J. ZEALEY
UNITED STATES ATTORNEY

/s/ Deborah A. Solove
DEBORAH A. SOLOVE (0024552)
Assistant United States Attorney
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Attorney for the Plaintiff,
United States of America

Case No. 97-4158

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ORDER

(Filed June 17, 1999)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

REAL PROPERTY LOCATED AT
1184 DRYCREEK ROAD,
GRANVILLE, OHIO 43023;

Defendant

CHARLES WILLIAM O'BRIEN

Claimant - Appellant

BEFORE: KENNEDY, DAUGHTREY, and CLAY, Circuit Judges.

Upon consideration of the petition for rehearing filed by the appellant.

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED.**

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

18 U.S.C.A. § 981

UNITED STATES CODE ANNOTATED
TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I – CRIMES
CHAPTER 46 – FORFEITURE

Current through P.L. 106-20, approved 4-9-99

§ 981. Civil forfeiture

(a)(1) Except as provided in paragraph (2), the following property is subject to forfeiture to the United States:

(A) Any property, real or personal, involved in a transaction or attempted transaction in violation of section 5313(a) or 5324(a) of title 31, or of section 1956 or 1957 of this title, or any property traceable to such property. However, no property shall be seized or forfeited in the case of a violation of section 5313(a) of title 31 by a domestic financial institution examined by a Federal bank supervisory agency or a financial institution regulated by the Securities and Exchange Commission or a partner, director, or employee thereof.

(B) Any property, real or personal, within the jurisdiction of the United States, constituting, derived from, or traceable to, any proceeds obtained directly or indirectly from an offense against a foreign nation involving the manufacture, importation, sale, or distribution of a controlled substance (as such term is defined for the purposes of the Controlled Substances Act), within whose jurisdiction such offense would be punishable by death or imprisonment for a term exceeding one year and which would be punishable under the laws of the United States by imprisonment for a term exceeding one year if such act or activity constituting the offense against the

foreign nation had occurred within the jurisdiction of the United States.

(C) Any property, real or personal, which constitutes or is derived from proceeds traceable to a violation of section 215, 471, 472, 473, 474, 476, 477, 478, 479, 480, 481, 485, 486, 487, 488, 501, 502, 510, 542, 545, 656, 657, 842, 844, 1005, 1006, 1007, 1014, 1028, 1029, 1030, 1032, or 1344 of this title or a violation of section 1341 or 1343 of such title affecting a financial institution.

(D) Any property, real or personal, which represents or is traceable to the gross receipts obtained, directly or indirectly, from a violation of –

(i) section 666(a)(1) (relating to Federal program fraud);

(ii) section 1001 (relating to fraud and false statements);

(iii) section 1031 (relating to major fraud against the United States);

(iv) section 1032 (relating to concealment of assets from conservator or receiver of insured financial institution);

(v) section 1341 (relating to mail fraud); or

(vi) section 1343 (relating to wire fraud),

if such violation relates to the sale of assets acquired or held by the Resolution Trust Corporation, the Federal Deposit Insurance Corporation, as conservator or receiver for a financial institution, or any other conservator for a financial institution appointed by the Office of the Comptroller of the Currency or the Office of Thrift Supervision or the National Credit

Union Administration, as conservator or liquidating agent for a financial institution.

(E) With respect to an offense listed in subsection (a)(1)(D) committed for the purpose of executing or attempting to execute any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent statements, pretenses, representations or promises, the gross receipts of such an offense shall include all property, real or personal, tangible or intangible, which thereby is obtained, directly or indirectly.

(F) Any property, real or personal, which represents or is traceable to the gross proceeds obtained, directly or indirectly, from a violation of –

(i) section 511 (altering or removing motor vehicle identification numbers);

(ii) section 553 (importing or exporting stolen motor vehicles);

(iii) section 2119 (armed robbery of automobiles);

(iv) section 2312 (transporting stolen motor vehicles in interstate commerce); or

(v) section 2313 (possessing or selling a stolen motor vehicle that has moved in interstate commerce).

(2) No property shall be forfeited under this section to the extent of the interest of an owner or lienholder by reason of any act or omission established by that owner or lienholder to have been committed without the knowledge of that owner or lienholder.

(b)(1) Any property –

(A) subject to forfeiture to the United States under subparagraph (A) or (B) of subsection (a)(1) of this section –

(i) may be seized by the Attorney General; or

(ii) in the case of property involved in a violation of section 5313(a) or 5324 of title 31, United States Code, or section 1956 or 1957 of this title investigated by the Secretary of the Treasury or the United States Postal Service, may be seized by the Secretary of the Treasury or the Postal Service; and

(B) subject to forfeiture to the United States under subparagraph (C) of subsection (a)(1) of this section may be seized by the Attorney General, the Secretary of the Treasury, or the Postal Service.

(2) Property shall be seized under paragraph (1) of this subsection upon process issued pursuant to the Supplemental Rules for certain Admiralty and Maritime Claims by any district court of the United States having jurisdiction over the property, except that seizure without such process may be made when –

(A) the seizure is pursuant to a lawful arrest or search; or

(B) the Attorney General, the Secretary of the Treasury, or the Postal Service, as the case may be, has obtained a warrant for such seizure pursuant to the Federal Rules of Criminal Procedure, in which event proceedings under subsection (d) of this section shall be instituted promptly.

(c) Property taken or detained under this section shall not be repleviable, but shall be deemed to be in the custody of the Attorney General, the Secretary of the Treasury, or the Postal Service as the case may be, subject only to the orders and decrees of the court or the official having jurisdiction thereof. Whenever property is seized under this subsection, the Attorney General, the Secretary of the Treasury, or the Postal Service as the case may be, may –

(1) place the property under seal;

(2) remove the property to a place designated by him; or

(3) require that the General Services Administration take custody of the property and remove it, if practicable, to an appropriate location for disposition in accordance with law

(d) For purposes of this section, the provisions of the customs laws relating to the seizure, summary and judicial forfeiture, condemnation of property for violation of the customs laws, the disposition of such property or the proceeds from the sale of this section, the remission or mitigation of such forfeitures, and the compromise of claims (19 U.S.C. 1602 et seq), insofar as they are applicable and not inconsistent with the provisions of this section, shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under this section, except that such duties as are imposed upon the customs officer or any other person with respect to the seizure and forfeiture of property under the customs laws shall be performed with respect to seizures and forfeitures of property under this section by such officers, agents, or other persons as may be authorized or designated for that

purpose by the Attorney General, the Secretary of the Treasury, or the Postal Service, as the case may be. The Attorney General shall have sole responsibility for disposing of petitions for remission or mitigation with respect to property involved in a judicial forfeiture proceeding.

(e) Notwithstanding any other provision of the law, except section 3 of the Anti Drug Abuse Act of 1986, the Attorney General, the Secretary of the Treasury, or the Postal Service as the case may be, is authorized to retain property forfeited pursuant to this section, or to transfer such property on such terms and conditions as he may determine –

(1) to any other Federal agency;

(2) to any State or local law enforcement agency which participated directly in any of the acts which led to the seizure or forfeiture of the property;

(3) in the case of property referred to in subsection (a)(1)(C), to any Federal financial institution regulatory agency –

(A) to reimburse the agency for payments to claimants or creditors of the institution; and

(B) to reimburse the insurance fund of the agency for losses suffered by the fund as a result of the receivership or liquidation;

(4) in the case of property referred to in subsection (a)(1)(C), upon the order of the appropriate Federal financial institution regulatory agency, to the financial institution as restitution, with the value of the property so transferred to be set off against any amount later recovered by the financial institution as

compensatory damages in any State or Federal proceeding;

(5) in the case of property referred to in subsection (a)(1)(C), to any Federal financial institution regulatory agency, to the extent of the agency's contribution of resources to, or expenses involved in, the seizure and forfeiture, and the investigation leading directly to the seizure and forfeiture, of such property;

(6) in the case of property referred to in subsection (a)(1)(C), restore forfeited property to any victim of an offense described in subsection (a)(1)(C); or

(7) In the case of property referred to in subsection (a)(1)(D), to the Resolution Trust Corporation, the Federal Deposit Insurance Corporation, or any other Federal financial institution regulatory agency (as defined in section 8(e)(7)(D) of the Federal Deposit Insurance Act).

The Attorney General, the Secretary of the Treasury, or the Postal Service, as the case may be, shall ensure the equitable transfer pursuant to paragraph (2) of any forfeited property to the appropriate State or local law enforcement agency so as to reflect generally the contribution of any such agency participating directly in any of the acts which led to the seizure or forfeiture of such property. A decision by the Attorney General, the Secretary of the Treasury, or the Postal Service pursuant to paragraph (2) shall not be subject to review. The United States shall not be liable in any action arising out of the use of any property the custody of which was transferred pursuant to this section to any non-Federal agency. The Attorney General, the Secretary of the Treasury, or the

Postal Service may order the discontinuance of any forfeiture proceedings under this section in favor of the institution of forfeiture proceedings by State or local authorities under an appropriate State or local statute. After the filing of a complaint for forfeiture under this section, the Attorney General may seek dismissal of the complaint in favor of forfeiture proceedings under State or local law. Whenever forfeiture proceedings are discontinued by the United States in favor of State or local proceedings, the United States may transfer custody and possession of the seized property to the appropriate State or local official immediately upon the initiation of the proper actions by such officials. Whenever forfeiture proceedings are discontinued by the United States in favor of State or local proceedings, notice shall be sent to all known interested parties advising them of the discontinuance or dismissal. The United States shall not be liable in any action arising out of the seizure, detention, and transfer of seized property to State or local officials. The United States shall not be liable in any action arising out of a transfer under paragraph (3), (4), or (5) of this subsection.

(f) All right, title, and interest in property described in subsection (a) of this section shall vest in the United States upon commission of the act giving rise to forfeiture under this section.

(g) The filing of an indictment or information alleging a violation of law, Federal, State or local, which is also related to a forfeiture proceeding under this section shall, upon motion of the United States and for good cause shown, stay the forfeiture proceeding.

(h) In addition to the venue provided for in section 1395 of title 28 or any other provision of law, in the case of property of a defendant charged with a violation that is the basis for forfeiture of the property under this section, a proceeding for forfeiture under this section may be brought in the judicial district in which the defendant owning such property is found or in the judicial district in which the criminal prosecution is brought.

(i)(1) Whenever property is civilly or criminally forfeited under this chapter, the Attorney General or the Secretary of the Treasury, as the case may be, may transfer the forfeited personal property or the proceeds of the sale of any forfeited personal or real property to any foreign country which participated directly or indirectly in the seizure or forfeiture of the property, if such a transfer –

(A) has been agreed to by the Secretary of State;

(B) is authorized in an international agreement between the United States and the foreign country; and

(C) is made to a country which, if applicable, has been certified under section 481(h) of the Foreign Assistance Act of 1961.

A decision by the Attorney General or the Secretary of the Treasury pursuant to this paragraph shall not be subject to review. The foreign country shall, in the event of a transfer of property or proceeds of sale of property under this subsection, bear all expenses incurred by the United States in the seizure, maintenance, inventory, storage, forfeiture, and disposition of the property, and all

transfer costs. The payment of all such expenses, and the transfer of assets pursuant to this paragraph, shall be upon such terms and conditions as the Attorney General or the Secretary of the Treasury may, in his discretion, set.

(2) The provisions of this section shall not be construed as limiting or superseding any other authority of the United States to provide assistance to a foreign country in obtaining property related to a crime committed in the foreign country, including property which is sought as evidence of a crime committed in the foreign country.

(3) A certified order or judgment of forfeiture by a court of competent jurisdiction of a foreign country concerning property which is the subject of forfeiture under this section and was determined by such court to be the type of property described in subsection (a)(1)(B) of this section, and any certified recordings or transcripts of testimony taken in a foreign judicial proceeding concerning such order or judgment of forfeiture, shall be admissible in evidence in a proceeding brought pursuant to this section. Such certified order or judgment of forfeiture, when admitted into evidence shall constitute probable cause that the property forfeited by such order or judgment of forfeiture is subject to forfeiture under this section and creates a rebuttable presumption of the forfeitability of such property under this section.

(4) A certified order or judgment of conviction by a court of competent jurisdiction of a foreign country concerning an unlawful drug activity which gives rise to forfeiture under this section and any certified recordings or transcripts of testimony taken in a foreign judicial

proceeding concerning such order or judgment of conviction shall be admissible in evidence in a proceeding brought pursuant to this section. Such certified order or judgment of conviction, when admitted into evidence, creates a rebuttable presumption that the unlawful drug activity giving rise to forfeiture under this section has occurred.

(5) The provisions of paragraphs (3) and (4) of this subsection shall not be construed as limiting the admissibility of any evidence otherwise admissible, nor shall they limit the ability of the United States to establish probable cause that property is subject to forfeiture by any evidence otherwise admissible.

(j) For purposes of this section –

(1) the term "Attorney General" means the Attorney General or his delegate; and

(2) the term "Secretary of the Treasury" means the Secretary of the Treasury or his delegate.

UNITED STATES CODE ANNOTATED
TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I – CRIMES
CHAPTER 63 – MAIL FRAUD

Current through P.L. 106-20, approved 4-9-99

§ 1344. Bank fraud

Whoever knowingly executes, or attempts to execute, a scheme or artifice –

(1) to defraud a financial institution; or

(2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;

shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

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18 U.S.C.A. § 1956

UNITED STATES CODE ANNOTATED
TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I – CRIMES
CHAPTER 95 – RACKETEERING

Current through P.L. 106-20, approved 4-9-99

§ 1956. Laundering of monetary instruments

(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some

form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity –

(A)(i) with the intent to promote the carrying on of specified unlawful activity; or

(ii) with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986; or

(B) knowing that the transaction is designed in whole or in part –

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State of Federal law,

shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

(2) Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States –

(A) with the intent to promote the carrying on of specified unlawful activity; or

(B) knowing that the monetary instrument or funds involved in the transportation, transmission, or transfer represent the proceeds of some form of

unlawful activity and knowing that such transportation, transmission, or transfer is designed in whole or in part –

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law,

shall be sentenced to a fine of not more than $500,000 or twice the value of the monetary instrument or funds involved in the transportation, transmission, or transfer whichever is greater, or imprisonment for not more than twenty years, or both. For the purpose of the offense described in subparagraph (B), the defendant's knowledge may be established by proof that a law enforcement officer represented the matter specified in subparagraph (B) as true, and the defendant's subsequent statements or actions indicate that the defendant believed such representations to be true.

(3) Whoever, with the intent –

(A) to promote the carrying on of specified unlawful activity;

(B) to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity; or

(C) to avoid a transaction reporting requirement under State or Federal law,

conducts or attempts to conduct a financial transaction involving property represented to be the proceeds of specified unlawful activity, or property used to conduct

or facilitate specified unlawful activity, shall be fined under this title or imprisoned for not more than 20 years, or both. For purposes of this paragraph and paragraph (2), the term "represented" means any representation made by a law enforcement officer or by another person at the direction of, or with the approval of, a Federal official authorized to investigate or prosecute violations of this section.

(b) Whoever conducts or attempts to conduct a transaction described in subsection (a)(1) or (a)(3), or a transportation, transmission, or transfer described in subsection (a)(2), is liable to the United states for a civil penalty of not more than the greater of –

(1) the value of the property, funds, or monetary instruments involved in the transaction; or

(2) $10,000.

(c) As used in this section –

(1) the term "knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity" means that the person knew the property involved in the transaction represented proceeds from some form, though not necessarily which form, of activity that constitutes a felony under State, Federal, or foreign law, regardless of whether or not such activity is specified in paragraph (7);

(2) the term "conducts" includes initiating, concluding, or participating in initiating, or concluding a transaction;

(3) the term "transaction" includes a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition, and with respect to a financial institution

includes a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument, use of a safe deposit box, or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected;

(4) the term "financial transaction" means (A) a transaction which in any way or degree affects interstate or foreign commerce (i) involving the movement of funds by wire or other means or (ii) involving one or more monetary instruments, or (iii) involving the transfer of title to any real property, vehicle, vessel, or aircraft, or (B) a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree;

(5) the term "monetary instruments" means (i) coin or currency of the United States or of any other country, travelers' checks, personal checks, bank checks, and money orders, or (ii) investment securities or negotiable instruments, in bearer form or otherwise in such form that title thereto passes upon delivery;

(6) the term "financial institution" has the definition given that term in section 5312(a)(2) of title 31, United States Code, or the regulations promulgated thereunder;

(7) the term "specified unlawful activity" means –

(A) any act or activity constituting an offense listed in section 1961(1) of this title except an act which is indictable under subchapter II of chapter 53 of title 31;

(B) with respect to a financial transaction occurring in whole or in part in the United

States, an offense against a foreign nation involving –

(i) the manufacture, importation, sale, or distribution of a controlled substance (as such term is defined for the purposes of the Controlled Substances Act);

(ii) murder, kidnapping, robbery, extortion, or destruction of property by means of explosive or fire;

(iii) fraud, or any scheme or attempt to defraud, by or against a foreign bank (as defined in paragraph 7 of section 1(b) of the International Banking Act of 1978 [FN1];

(C) any act or acts constituting a continuing criminal enterprise, as that term is defined in section 408 of the Controlled Substances Act (21 U.S.C. 848);

(D) an offense under section 32 (relating to the destruction of aircraft), section 37 (relating to violence at international airports), section 115 (relating to influencing, impeding, or retaliating against a Federal official by threatening or injuring a family member), section 152 (relating to concealment of assets; false oaths and claims; bribery), section 215 (relating to commissions or gifts for procuring loans), section 351 (relating to congressional or Cabinet officer assassination), any of section 500 through 503 (relating to certain counterfeiting offenses), section 513 (relating to securities of States and private entities), section 542 (relating to entry of goods by means of false statements), section 545 (relating to smuggling goods into the United States), section 549 (relating to removing goods from Customs custody), section 641 (relating to public money,

property, or records), section 656 (relating to theft, embezzlement, or misapplication by bank officer or employee), section 657 (relating to lending, credit, and insurance institutions), section 658 (relating to property mortgaged or pledged to farm credit agencies), section 666 (relating to theft or bribery concerning programs receiving Federal funds), section 793, 794, or 798 (relating to espionage), section 831 (relating to prohibited transactions involving nuclear materials), section 844(f) or (i) (relating to destruction by explosives or fire of Government property or property affecting interstate or foreign commerce), section 875 (relating to interstate communications), section 956 (relating to conspiracy to kill, kidnap, maim, or injure certain property in a foreign country), section 1005 (relating to fraudulent bank entries), 1006 (relating to fraudulent Federal credit institution entries), 1007 (relating to fraudulent Federal Deposit Insurance transactions), 1014 (relating to fraudulent loan or credit applications), 1032 (relating to concealment of assets from conservator, receiver, or liquidating agent of financial institution), section 1111 (relating to murder), section 1114 (relating to murder of United States law enforcement officials), section 1116 (relating to murder of foreign officials, official guests, or internationally protected persons), section 1201 (relating to kidnapping), section 1203 (relating to hostage taking), section 1361 (relating to willful injury of Government property), section 1363 (relating to destruction of property within the special maritime and territorial jurisdiction), section 1708 (theft from the mail), section 1751 (relating to Presidential assassination), section 2113 or 2114 (relating to bank

and postal robbery and theft), section 2280 (relating to violence against maritime navigation), section 2281 (relating to violence against maritime fixed platforms), section 2319 (relating to copyright infringement), section 2320 (relating to trafficking in counterfeit goods and services),, [FN2] section 2332 (relating to terrorist acts abroad against United States nationals), section 2332a (relating to use of weapons of mass destruction), section 2332b (relating to international terrorist acts transcending national boundaries), or section 2339A (relating to providing material support to terrorists) of this title, section 46502 of title 49, United States Code,, [FN2] a felony violation of the Chemical Diversion and Trafficking Act of 1988 (relating to precursor and essential chemicals), section 590 of the Tariff Act of 1930 (19 U.S.C. 1590) (relating to aviation smuggling), section 422 of the Controlled Substances Act (relating to transportation of drug paraphernalia), section 38(c) (relating to criminal violations) of the Arms Export Control Act, section 11 (relating to violations) of the Export Administration Act of 1979, section 206 (relating to penalties) of the International Emergency Economic Powers Act, section 16 (relating to offenses and punishment) of the Trading with the Enemy Act, any felony violation of section 15 of the Food Stamp Act of 1977 (relating to food stamp fraud) involving a quantity of coupons having a value of not less than $5,000, or any felony violation of the Foreign Corrupt Practices Act; or

(E) a felony violation of the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.), the Ocean Dumping Act (33 U.S.C. 1401 et seq.), the Act to Prevent Pollution from Ships (33 U.S.C. 1901 et seq.), the Safe Drinking Water Act (42

U.S.C. 300f et seq.), or the Resources Conservation and Recovery Act (42 U.S.C. 6901 et seq.).

(F) Any act or activity constituting an offense involving a Federal health care offense.

(8) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

(d) Nothing in this section shall supersede any provision of Federal, State, or other law imposing criminal penalties or affording civil remedies in addition to those provided for in this section.

(e) Violations of this section may be investigated by such components of the Department of Justice as the Attorney General may direct, and by such components of the Department of the Treasury as the Secretary of the Treasury may direct, as appropriate and, with respect to offenses over which the United States Postal Service has jurisdiction, by the Postal Service. Such authority of the Secretary of the Treasury and the Postal Service shall be exercised in accordance with an agreement which shall be entered into by the Secretary of the Treasury, the Postal Service, and the Attorney General. Violations of this section involving offenses described in paragraph (c)(7)(E) may be investigated by such components of the Department of Justice as the Attorney General may direct, and the National Enforcement Investigations Center of the Environmental Protection Agency.

(f) There is extraterritorial jurisdiction over the conduct prohibited by this section if –

(1) the conduct is by a United States citizen or, in the case of a non-United States citizen, the conduct occurs in part in the United States; and

(2) the transaction or series of related transactions involves funds or monetary instruments of a value exceeding $10,000.

(g) Notice of conviction of financial institutions. – If any financial institution or any officer, director, or employee of any financial institution has been found guilty of an offense under this section, section 1957 or 1960 of this title, or section 5322 or 5324 of title 31, the Attorney General shall provide written notice of such fact to the appropriate regulatory agency for the financial institution.

(h) Any person who conspires to commit any offense defined in this section or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.